

83-6184

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. \_\_\_\_\_

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FREDDIE LEE WILLIAMS,

Petitioner,

v.

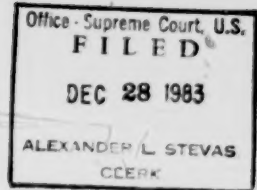
THE STATE OF FLORIDA,

Respondent.  
\_\_\_\_\_

PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF FLORIDA  
\_\_\_\_\_

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PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF FLORIDA

Petitioner, FREDDIE LEE WILLIAMS, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of Florida entered in these proceedings on June 23, 1983, rehearing denied September 29, 1983.

OPINIONS BELOW

The Opinion of the Florida Supreme Court on the direct appeal of the Petitioner's conviction and sentence of death is reported as Williams v. State of Florida, 437 So.2d 133 (Fla. 1983), and is attached as Appendix A.

JURISDICTION

The Judgment of the Supreme Court of Florida was entered on June 23, 1983. A timely Motion for Rehearing was denied on September 29, 1983, as is reflected in the published opinion in the Southern Reporter attached as Appendix A. Williams v. State of Florida, 437 So.2d 133 (Fla. 1983). Petitioner's application for extension of time with which to file a Petition for Writ of Certiorari was granted on November 21, 1983, by the Honorable Lewis F.

Powell, Associate Justice, extending the time for the filing of the Petition for Writ of Certiorari in the instant case to and including December 28, 1983. This court's jurisdiction is invoked under 28 U.S.C. 1257(3), Petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the failure of the Florida Supreme Court to consider non-statutory but judicially recognized mitigating circumstances when conducting a proportionality review of the applicability of a death sentence constitutes excessive and disproportion of punishment forbidden by the Eighth and Fourteenth Amendments, and constitutes an equal protection violation under the Fourteenth Amendment.

2. Whether the Florida Supreme Court failed to perform a constitutionally adequate proportionality review since Petitioner's case was factually inapposite from several other Florida Supreme Court cases where it was held that the death penalty would constitute excessive and disproportionate punishment forbidden by the Eighth and Fourteenth Amendments.

3. Whether the Florida Supreme Court by considering the Petitioner's parole status at the time of the offense and his prior conviction as two (2) separate aggravating circumstances constitutes an improper doubling of aggravating circumstances resulting in excessive and disproportionate punishment forbidden by the Eighth and Fourteenth Amendments.

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted . . .

And the Fourteenth Amendment to the Constitution of the

United States which provides, in pertinent part:

[Nor] shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the following provisions of the statutes of the State of Florida which are applicable to this Petition. Fla. Stat. Ann. 782.04(1)(a) (1979) which provides:

782.04 Murder - (1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §775.082.

and 921.141 (1979) which provides:

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence -

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY - Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigation circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United

States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY - After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5).

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH - Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE - The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES - Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any reobbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for

pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretence of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES - Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

HOW THE FEDERAL QUESTIONS  
WERE RAISED AND DECIDED BELOW

1. The question of the failure of the Florida Supreme Court to consider non-statutory mitigating circumstances when conducting its proportionality review as constituting excessive and disproportionate punishment forbidden by the Eighth and Fourteenth Amendments was raised at the trial court level during the advisory sentencing proceeding, specifically in Petitioner's Brief on Appeal to the Florida Supreme Court, and generally in the dissenting opinion of Mr. Justice Overton in the Florida Supreme Court opinion (Appendix A). The failure of the Florida Supreme Court to consider the non-statutory but judicially recognized mitigating circumstances that Petitioner had two (2) children he cared for and that a domestic relationship existed between the Petitioner and the victim prior to the murder as violating the Defendant's equal protection rights was raised during the advisory sentencing proceeding in the trial court, generally throughout Petitioner's Brief to the



Florida Supreme Court, and implicitly in Mr. Justice Overton's dissenting opinion (Appendix A).

2. The failure of the Florida Supreme Court to perform a constitutionally adequate proportionality review of Petitioner's case as compared to several other Florida Supreme Court cases wherein it was held that the death penalty would be constitutionally inappropriate was raised during the advisory sentencing proceedings in the trial court, specifically in Petitioner's Brief on Appeal to the Florida Supreme Court, and explicitly and expressly in the dissenting opinion of Justice Overton (Appendix A).

3. The question of whether the Florida Supreme Court by considering the Petitioner's parole status at the time of the offense and one of his prior convictions which was the reason he was in that parole status as two (2) separate aggravating circumstances as an improper doubling of aggravating circumstances was raised expressly during the advisory sentencing proceeding, and in Petitioner's Brief on Appeal to the Florida Supreme Court.

#### STATEMENT OF THE CASE

##### A. The Facts

Petitioner, a black, and the victim, Mary Robinson [Mary], had lived together as boyfriend-girlfriend for eighteen (18) years prior to her killing (R-227-230).<sup>1</sup> On the night of the murder, the victim went to her sister's house and there received three (3) upsetting telephone calls from Petitioner. After these calls, the victim and her sister went to Jai-Alai and returned to the apartment of the Petitioner and victim around 11:00 in the evening. The sister left and Williams soon arrived and shortly thereafter called the sister to report that something had happened to the victim. When the sister returned, the police were

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<sup>1</sup>In this Petition, "R" is a reference to the appropriate page number in the Record on Appeal in the trial court.

already present and the victim was dead. The victim's sister described Williams as screaming when she arrived at the apartment (R-231-239). A test of the victim's blood by the medical examiner indicated she had .155 milligrams of alcohol, indicating she was "under the influence" at the time of the shooting (R-513). Petitioner had also been drinking.

Earlier that evening, Petitioner had borrowed a neighbor's hand gun, telling the neighbor that he was going gambling. Petitioner had borrowed the gun from the neighbor on at least three (3) prior occasions (R-244-259). Petitioner testified that he left the gun on the dresser in the bedroom at home when he went out and that upon his return, the victim staggered toward him, already shot. Petitioner himself called the police and an ambulance. Petitioner also testified that he did not want the police to find a weapon in his possession since he was on parole. He testified that he borrowed the gun from his neighbor, but did not take it from the apartment until after Mary had gone to Jai-Alai. He went several places that night, including to his mother's residence where he saw a friend named Rosa Lee Jones. Petitioner was not arrested for the murder until three (3) days later. Petitioner denied that he was the one who had shot Mary (R-630-667). There were no eyewitnesses to the shooting.

As the Florida Supreme Court stated in its opinion, the State's case revolved around long-standing domestic arguments between Williams and the victim and in particular, Williams' anger over the victim supposedly taking a shower that night, a sign that he took to mean that the victim was cleaning up after being with another man (Appendix A).

#### B. Trial Proceedings

Petitioner was arrested for First Degree Murder on November 10, 1980, three (3) days after the date of the offense (R-1072-1074). A preliminary hearing was conducted,

probable cause was found, and Petitioner was held to answer the charges on November 26, 1980 (R-1078-1080). Williams was indicted on January 29, 1981, for First Degree Murder (R-1084). A written plea of not guilty and a Notice of Appearance was filed by private counsel on December 3, 1980 (R-1083). On March 23, 1981, said private counsel was allowed to withdraw (R-1134) and on April 1, 1981, the Public Defender appeared for Petitioner (R-1170).

Trial by jury was conducted on October 12 through October 16, 1981 (R-1-746) with a finding of guilty as charged by the jury (R-739-740; 1332). The advisory phase of the trial was conducted on October 20, 1981 (R-758-848). During said advisory phase, the jury recommended the death sentence by a vote of 8 jurors recommending the death sentence and 4 recommending life imprisonment (R-843-845).

Edward Mullis, the lead investigator in the case, testified that he conducted a gunshot residue test on the Petitioner when arriving at the apartment to attempt to determine if the Petitioner had fired a weapon (R-489). However, the test was inconclusive (R-616).

During the advisory phase of the trial, the Petitioner merely introduced documents showing Petitioner's two (2) prior convictions (R-779-782). Petitioner stipulated that he was on parole at the time of the offense as a result of one of the two (2) convictions admitted into evidence (R-779-782). Petitioner produced the following testimony:

Virginia Wilson - She has known Petitioner all of his life and knows him to be a person who loves and helps people (R-783-784).

Rosabelle Thompson - She has known Petitioner about 16 years and he has always been kind to her and he cares about people (R-785-786).

Gladys Forsyth - She knew Williams 15 years and he thought of her as a mother. He treated her nice and he took



care of his own two (2) children (R-788-789).

Wilbur Johnson - This witness was Petitioner's employer. Petitioner was a good worker who never posed any problems (R-790-791).

Gussie Lee Williams - This is Petitioner's mother. Williams was born in Alabama and Petitioner's father died when Williams was very young. She and her daughter raised him "the best way I can," the witness having had no education. Petitioner has two (2) sons whom Petitioner raised along with his mother (R-792-794).

Gary Lee Williams - This high school student is the son of Petitioner. Williams is a "good father," who worked and supported this witness (R-795-797).

Mary Lee Williams - Petitioner is the brother of this witness. Their father died when she was eight (8) and when Williams was seven (7) years of age (R-797-799).

Freddie Lee Williams - Petitioner - His father died when Petitioner was of tender age, leaving five (5) children. Williams had three (3) brothers whom he helped raise. He left school in the ninth grade to help support the family. He has done construction work, installation of cables and fruit picking (R-800-802). Petitioner is black.

Petitioner was sentenced to death on December 18, 1981, after an eight-to-four (8-4) vote by the advisory jury for the death penalty. The trial judge found two (2) aggravating circumstances under Florida Statute §941.41 (5):

(a) The capital felony was committed by a person under sentence of imprisonment (because he was on parole at the time).

(b) The defendant was previously convicted of another capital felony involving the use or threat of violence to a person (one of the two convictions relied on for this aggravating circumstance was the reason he was on parole at the time. (R-1368-1372)

Despite the fact that evidence at trial disclosed a long-standing domestic relationship between the Petitioner and the victim, the fact that Petitioner had two (2) minor children he was raising, the fact the Petitioner made no

effort to flee, and the testimony of Petitioner's character witnesses, the trial court did not acknowledge those factors as being judicially-recognized non-statutory mitigating circumstances (R-1371) which could offset the aggravating circumstances. Petitioner was sentenced to death on December 18, 1981 (R-849-862).

### C. The Direct Appeal

The Florida Supreme Court unanimously affirmed Petitioner's conviction, and by a vote of five-to-one (5-1), affirmed Petitioner's death sentence (Appendix A).

The court rejected Petitioner's proportionality arguments, as well as Petitioner's argument that the trial court erred by doubling the aggravating circumstances.

Mr. Justice Overton concurred with the conviction but dissented in the imposition of the death sentence stating:

In my judgment, proportionate review with other cases requires a reduction of the sentence to life imprisonment without parole for twenty-five (25) years. I disagree with the majority opinion that this case is factually inapposite from Blair v. State, 406 So.2d 1103 (Fla. 1981); Phippen v. State, 389 So.2d 991 (Fla. 1980); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Brown v. State, 367 So.2d 616 (Fla. 1979); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); Halliwel v. State, 323 So.2d 557 (Fla. 1975); and Tedder v. State, 322 So.2d 908 (Fla. 1975).

### REASONS FOR GRANTING THE WRIT

#### ONE

THE TRIAL COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE FAILURE OF THE FLORIDA SUPREME COURT TO CONSIDER NON-STATUTORY BUT JUDICIALLY-RECOGNIZED MITIGATING CIRCUMSTANCES WHEN CONDUCTING A PROPORTIONALITY REVIEW WOULD CONSTITUTE EXCESSIVE AND DISPROPORTIONATE PUNISHMENT FORBIDDEN BY THE EIGHTH AND FOURTEENTH AMENDMENTS AND A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The United States Supreme Court has mandated proportionality review of a death penalty sentence whether provided by statute, Gregg v. Georgia, 428 U.S. 153 (1976), or by case law, Proffitt v. Florida, 428 U.S. 242 (1976). The Supreme Court has discussed proportionality concerning the death penalty in at least two ways. First, in several

instances, the court has examined whether the death penalty was proportionate to the crime for which it was imposed, i.e., Coker v. Georgia, 433 U.S. 584 (1977) (sentence of death grossly disproportionate to crime of rape when no life taken) (plurality opinion). Second, the court has examined whether the penalty in the case was proportionate to other sentences imposed for similar crimes. Gregg v. Georgia, supra. This latter proportionality review, intended to prevent the arbitrary and capricious application of the death penalty, is the crux of Petitioner's argument herein.

The Florida Supreme Court on several occasions has expressly stated that non-statutory mitigating circumstances should be considered when making a decision whether or not the death penalty is constitutionally appropriate. Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied 441 U.S. 956 (1979); Herzog v. State, \_\_\_ So.2d \_\_\_ 1973 (1983 F.L.W. 383, Fla., Sept. 22, 1983); McC Campbell v. State, 421 So.2d 1072 (Fla. 1982).

During the advisory sentencing proceeding in the Petitioner's case, evidence was disclosed that Petitioner had two (2) minor sons whom he helped support. This was urged at the trial court level and by Petitioner before the Florida Supreme Court as a non-statutory mitigating circumstance. Additionally, the evidence at trial and during the advisory sentencing proceeding was that Petitioner and the victim had lived together on and off for eighteen (18) years in a domestic relationship. Further, the evidence showed that Williams did not flee after the killing. Character witnesses also testified on Williams' behalf. These factors were also urged at the trial court and Florida Supreme Court levels as a non-statutory but judicially-recognized mitigating circumstance. Nevertheless, the trial court improperly rejected these judicially-recognized non-statutory mitigating circumstances in imposing the death penalty (R-1370-1372).

The Florida Supreme Court has expressly recognized that the fact that a person has minor children is a non-statutory mitigating circumstance. In Jacobs v. State, 396 So.2d 713 (Fla. 1981), involving a female sentenced to death, the court stated:

The trial judge held the mistaken belief that he could not consider non-statutory mitigating circumstances . . . The jurors in this case may have considered that fact that Ms. Jacobs [the Defendant] was the mother of two children for whom she cared . . . 396 So.2d 713 at 718.

The Supreme Court in Jacobs v. State, supra, reversed the trial court's imposition of the death penalty in part based on the non-statutory mitigating circumstance that the defendant was the mother of two (2) children for whom she cared. It was undisputed that the Petitioner herein was the father of two (2) minor children for whom he cared and helped support and yet this was not accorded status as a non-statutory minimum circumstance in this case notwithstanding that it was in Jacobs v. State, supra.

Furthermore, the fact that a domestic relationship exists between the defendant and the victim has also been expressly recognized as a non-statutory mitigating circumstance. For example, in Herzog v. State, supra, the Florida Supreme Court recently stated:

The trial court properly found that no statutory mitigating circumstances existed; however, there is no indication in the sentencing order that the court considered non-statutory mitigating circumstances. We find evidence in the record that the jury could have considered in finding non-statutory circumstances (e.g. . . . the domestic relationship that existed [between the defendant and the victim] prior to the murder . . .). 1983 F.L.W. 383 at 386.

It is important to note that on three (3) separate occasions the Florida Supreme Court has reduced to life sentences, as opposed to merely remanding for resentencing, cases in which the jury recommended death and each of those cases involved a domestic dispute. See Halliwell v. State, supra; Kampff v. State, supra; and Blair v. State, supra. See also, Godfrey v. Georgia, 446 U.S. 420 (1980).

That the Petitioner voluntarily surrendered is also a non-statutory mitigating circumstance, Washington v. State, 362 So.2d 658 (Fla. 1978), as is evidence concerning good character of a defendant, Peek v. State, 395 So.2d 492 (Fla. 1980); Jacobs v. State, supra. However, both the trial court and the Florida Supreme Court dismissed these applicable circumstances without explanation.

The Florida Supreme Court acted arbitrarily and capriciously in refusing to apply the above-described four (4) non-statutory but judicially-recognized mitigating circumstances to Petitioner when the court had applied those circumstances to other death row appellants. Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Personnel Administration of Massachusetts v. Feeny, 442 U.S. 256 (1979). For example, this is especially evident when comparing Petitioner's situation with that of the female defendant in Jacobs v. State, supra, whose death sentence was reversed in part based on the judicially-recognized non-statutory mitigating circumstance that she had two (2) children she cared for (Petitioner herein has two (2) children he cared for). This constitutional error by the Florida Supreme Court is more pronounced by the fact that the only two statutory aggravating circumstances presented by Respondent did not relate to the commission of the offense itself but were rather based solely on Petitioner's status (a convicted felon on parole) at the time of the offense.

Both the trial court and the Florida Supreme Court arbitrarily and capriciously refused to consider the four (4) non-statutory but judicially-recognized mitigating circumstances described above in imposing the death penalty on the Petitioner. A violation of Petitioner's equal protection rights and right to be free from disproportionate punishment were violated when those four (4) non-statutory



mitigating circumstances were not considered in Petitioner's case but were considered and recognized in other Florida Supreme Court cases as justification for reversing trial court-imposed death sentences. Thus, the Petitioner's sentence of death cannot be upheld and the Florida Supreme Court was in error in affirming it.

## TWO

WHETHER THE FLORIDA SUPREME COURT FAILED TO PERFORM A CONSTITUTIONALLY ADEQUATE PROPORTIONALITY REVIEW SINCE PETITIONER'S CASE WAS FACTUALLY INAPPOSITE FROM SEVERAL OTHER FLORIDA SUPREME COURT CASES WHEREIN IT WAS HELD THAT THE DEATH PENALTY CONSTITUTED EXCESSIVE AND DISPROPORTIONATE PUNISHMENT FORBIDDEN BY THE EIGHTH AND FOURTEENTH AMENDMENTS

An unbroken line of cases since Furman v. Georgia, 408 U.S. 238 (1972) requires any state wishing to impose a capital sentence to channel the sentencers' discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a death sentence. Godfrey v. Georgia, 446 U.S. 420 (1980). Special capital sentencing requirements derive from the court's recognition that there is a significant constitutional difference between the infliction of the death penalty and lesser punishments. Beck v. Alabama, 447 U.S. 325 (1980). This qualitative difference calls for a greater degree of reliability when the sentence of death is imposed. Lockett v. Ohio, 437 U.S. 586 (1978).

The Florida Supreme Court has stated that in evaluating whether or not a death sentence is appropriate, that the court should consider the factual situation of the murder before it in comparison with the factual situations involving other murders wherein the death penalty was not found to be appropriate. In State v. Dixon, 283 So.2d 1 (Fla. 1973), the court stated:

It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating

circumstances and Y numbers of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present . . . If a defendant is sentenced to die, the court can review that case in light of the other decisions and determine whether or not the punishment is too great. 283 So.2d 1 at 10.

The Florida Supreme Court has recognized that it has the "responsibility to determine independently" if death is appropriate. Songer v. State, supra. See also Douglas v. State, 328 So.2d 18 (Fla. 1976). As stated in Harvard v. State, 375 So.2d 833, 834 (Fla., 1977), it is the duty of the Florida Supreme Court to "evaluate anew" the circumstances.

However, as can be seen by the sentencing order and the Florida Supreme Court's opinion in this case, it failed to follow its own proportionality guidelines which clearly would have resulted in the reduction of Petitioner's penalty from death to life imprisonment. The Florida Supreme Court ignored its own set proportionality review procedures and followed the procedure that was condemned in State v. Dixon, supra, by participating in a counting process of adding "X number of [statutory] aggravating circumstances and Y number of [statutory] mitigating circumstances . . ." rather than factually comparing Petitioner's offense with other murders where the death penalty was found to be constitutionally impermissible.

A two-part test was set forth in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). The Florida Supreme Court's first function is to determine if the trial judge properly applied the procedures of Florida Statute §921.141. If the Florida Supreme Court determines the lower court was correct, then a "proportionality" determination must be made. In other words, the court must decide, as stated in State v. Dixon, supra, how the case compares factually with other cases.

In the instant case, Mr. Justice Overton concurred in Petitioner's conviction but dissented from the imposition

of the death sentence stating:

I concur with the conviction. I dissent from the imposition of the death sentence. In my judgment, proportionate review with other cases requires a reduction of the sentence to life imprisonment without parole for twenty-five years. I disagree with the majority opinion that this case is factually inapposite from Blair v. State, 406 So.2d 1103 (Fla. 1981); Phippen v. State, 389 So.2d 991 (Fla. 1980); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Brown v. State, 367 So.2d 616 (Fla. 1979); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); Halliwell v. State, 323 So.2d 557 (Fla. 1975); and Tedder v. State, 322 So.2d 908 (Fla. 1975). Those cases must be used to properly evaluate the proportionality of the death sentence in this case.

Mr. Justice Overton, dissenting, correctly applied the proportionality test in Petitioner's case and properly found the death penalty constitutionally inapplicable in Petitioner's case. In the following cases, the Florida Supreme Court reversed a court-imposed death sentence and entered a sentence of life imprisonment under circumstances much more serious than those in the instant case.

Tedder v. State, 322 So.2d 908 (Fla. 1975) - in this case, the defendant fired a shot at his wife, child and mother-in-law. They fled into a trailer and defendant pursued. While inside, the defendant killed his mother-in-law with a gun. He then would not let his wife come to her aid. The lower court found three aggravating circumstances including that the crime was heinous. The Florida Supreme Court found that it was not heinous, found no mitigating circumstances, but reduced Tedder's death sentence to life imprisonment.

Chambers v. State, 339 So.2d 204 (Fla. 1976) - the defendant and victim had been living together. An argument arose which resulted in defendant beating her all over her head and legs. She died of cerebral and brain stemmed contusion. She was beaten so badly her face was unrecognizable. The lower court found the crime to be heinous and found no mitigating circumstances. The Florida Supreme Court found that the "totality of the circumstances"



did not warrant the death sentence and reduced the sentence to life.

McCaskill v. State, 344 So.2d 1276 (Fla. 1977) - this was a robbery-murder, with the murder caused by a gunshot blast from inside the getaway vehicle carrying three co-defendants. It is unknown who fired the blast. The trial court found that the crime created risks to a great number of people, and that it was committed during a robbery. The Florida Supreme Court determined that a life sentence, not death, was appropriate, relying largely on comparisons with other similar cases.

Brown v. State, 367 So.2d 616 (Fla. 1979) - the defendant, along with two others, abducted the victim for the purpose of stealing his car. They drove the victim to a lake, forced him into it, struck him with fists and boards and shot him. As they started to leave, the victim climbed out of the lake, so the three returned and a co-defendant held him under water until he died. The trial judge found that the crime was heinous and was done during a robbery and kidnapping. No mitigating circumstances were found. Without rejecting the lower court's findings, the Florida Supreme Court reversed the trial court's imposition of the death penalty based on "our precedents."

Phippen v. State, 389 So.2d 991 (Fla. 1980) - the defendant told someone that he was going to kill his mother and stepfather, which he subsequently did with four shots to the former and six to the latter. The trial court found that the murder was done for pecuniary gain and that it was heinous. The Florida Supreme Court found there was no proof of the pecuniary gain factor and held that the facts did not compel a death sentence, reversing the trial court's imposition of same.

It is unquestionable that in applying the proportionality test, the instant case is far less aggravated than those cases cited above, thus mandating a reduction of

sentence to one of life imprisonment. Furthermore, three of the above cases (Tedder, Chambers, Phippen) involved domestic disputes, as does the case before this court. Finally, on three occasions, the Florida Supreme Court has reduced to life sentences cases in which the jury recommended death and each of those cases involved a domestic dispute. See Halliwell v. State, 323 So.2d 557 (Fla. 1975); Kampff v. State, 371 So.2d 1007 (Fla. 1979); and Blair v. State, 406 So.2d 1103 (Fla. 1981).

A review of the facts of Petitioner's case as compared with the above cases demonstrates conclusively that imposition of the death sentence for this crime would constitute cruel and unusual punishment. This was a domestic dispute over the existence of a supposed lover. It was not committed for pecuniary gain, during the commission of any enumerated felonies, was not heinous, was not to cover up the commission of another crime, and the Petitioner did not flee after the commission of same. Arguably, the evidence does not even support a conviction for First Degree Murder or murder at all since it was a circumstantial evidence case and Petitioner denied he was the one who committed the offense. The sole aggravating factors related to the status of the Petitioner at the time of the offense and not to the circumstances of the event itself.

Under any proportionality review, aggravating circumstances surrounding the commission of the offense itself (i.e., for pecuniary gain; during a kidnapping or robbery; to cover up a crime) should weigh far more heavily than circumstances surrounding the status of the Petitioner at the time.

The Florida Supreme Court set up a procedure for proportionality review of death-sentence cases but unconstitutionally failed to follow its procedure in the Petitioner's case. This failure to follow a constitutionally-adequate proportionality review has

resulted in the imposition of the death penalty. Without relief from this court, the Florida Supreme Court's duty to perform a constitutionally-adequate proportionality review would result in excessive and disproportionate punishment being imposed upon Petitioner in violation of the Eighth and Fourteenth Amendments.

### THREE

WHETHER THE FLORIDA SUPREME COURT, BY CONSIDERING THE PETITIONER'S PAROLE STATUS AT THE TIME OF THE OFFENSE AND HIS PRIOR CONVICTION AS TWO SEPARATE AGGRAVATING CIRCUMSTANCES CONSTITUTES AN IMPROPER DOUBLING OF AGGRAVATING CIRCUMSTANCES RESULTING IN EXCESSIVE AND DISPROPORTIONATE PUNISHMENT FORBIDDEN BY THE EIGHTH AND FOURTEENTH AMENDMENTS

It is well settled that when one act constitutes a violation of two of the enumerated aggravating circumstances in Florida Statute §921.141(5) (1979), only one aggravation can be counted in the sentence determination process.

Province v. State, 337 So.2d 783 (Fla. 1976); Armstrong v. State, 399 So.2d 953 (Fla. 1981). Each of the Florida cases described thus far deals with the circumstances of subsection (d) of the above statute [that the murder was committed in the course of another enumerated felony] and subsection (f) [that the crime was committed for pecuniary gain] or with subsections (e) and (g) [avoiding arrest and hindering law enforcement]. See for example, Province v. State, supra, and Welty v. State, 402 So.2d 1159 (Fla. 1981).

In the instant case, the trial court and Florida Supreme Court found that Petitioner violated subsection (b) of the statute by having been convicted of two aggravated assaults in Case Numbers CR71-1551 and CR74-3442. The court also found a violation of subsection (a) of the statute which also involved Case Number CR74-3442, which resulted in Petitioner being on parole at the time of the offense. Clearly, the fact that Petitioner was legally on parole at the time of the offense does not ipso facto mean that he was under a sentence of imprisonment. The Florida Supreme


Court, by considering the Petitioner's parole status at the time of the offense and his prior conviction as two separate aggravating circumstances, constitutes an improper doubling of aggravating circumstances resulting in excessive and disproportionate punishment forbidden by the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For each of the foregoing reasons, the Petitioner, FREDDIE LEE WILLIAMS, respectfully submits that the court should grant the Petition for Writ of Certiorari and enter an order vacating the Florida Supreme Court judgment below approving the imposition of the death penalty.

Dated: Winter Park, Florida  
December 27, 1983

Respectfully submitted,

  
\_\_\_\_\_  
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Attorney for the Petitioner.

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. \_\_\_\_\_

\_\_\_\_\_  
FREDDIE LEE WILLIAMS,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

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SUPREME COURT, U.S.

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CERTIFICATE OF SERVICE

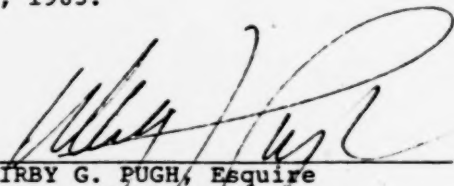
I HEREBY CERTIFY that I am a member of the bar of this court and that I served the Petition for a Writ of Certiorari to the Supreme Court of Florida on Respondent by placing three (3) copies in the United States mail, first class mail, postage prepaid, addressed as follows:

Jim Smith, Attorney General  
The Capitol  
Suite 1502  
Tallahassee, Florida 32301

Office of the Attorney General  
125 North Ridgewood Avenue  
Fourth Floor  
Daytona Beach, Florida 32018

All parties required to be served have been served.

Done this 27th day of December, 1983.

  
\_\_\_\_\_  
IRBY G. PUGH, Esquire  
218 Annie Street  
Orlando, Florida 32806  
Telephone: (305) 843-5840

Attorney for the Petitioner.

IN THE  
SUPREME COURT OF THE UNITED STATES

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No. \_\_\_\_\_

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FREDDIE LEE WILLIAMS,  
Petitioner,

v.

THE STATE OF FLORIDA,  
Respondent.

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APPENDIX

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Freddie Lee WILLIAMS, Appellant,

v.

STATE of Florida, Appellee.

No. 61549.

Supreme Court of Florida.

June 23, 1983.

Rehearing Denied Sept. 29, 1983.

Defendant was convicted in the Circuit Court, Orange County, Thomas E. Kirkland, J., of first-degree murder, and he appealed. The Supreme Court held that: (1) evidence was sufficient to find premeditation beyond reasonable doubt and to sustain conviction; (2) trial court did not err in refusing to give circumstantial evidence instruction in addition to standard jury instructions on reasonable doubt and burden of proof; (3) death sentence was not comparatively inappropriate; and (4) trial court properly determined existence of two distinct aggravating circumstances to warrant imposition of death sentence.

Affirmed.

Overton, J., concurred in part, dissented in part, and filed opinion.

1. Criminal Law ⇐1134(1)

Function of the Supreme Court in reviewing capital cases is to see if there is substantial, competent evidence to support the verdict.

2. Homicide ⇐232

Evidence was sufficient to find premeditation beyond reasonable doubt and to sustain first-degree murder conviction.

3. Homicide ⇐253(2)

Though evidence was circumstantial, it was nonetheless sufficient to sustain first-degree murder conviction, in absence of presentation by defendant of any reasonable hypothesis of innocence.

4. Criminal Law ⇐784(4)

Standard jury instructions on reasonable doubt and burden of proof were ade-

quate to instruct jury on circumstantial evidence, and the trial court did not abuse its discretion in refusing to give "old" circumstantial evidence instruction in addition to standard jury instructions.

5. Criminal Law ⇐1134(1)

In reviewing death sentence, the Supreme Court has duty to make proportionality determination and decide how case compares with other cases.

6. Homicide ⇐354

Death sentence imposed for first-degree murder was not comparatively inappropriate. U.S.C.A. Const.Amend. 8.

7. Homicide ⇐354

Defendant, who was on parole at time of subject homicide, was "under sentence of imprisonment," for purposes of aggravating circumstances; actual incarceration was not necessary. West's F.S.A. 921.141(5)(a, b).

8. Homicide ⇐354

Trial court properly determined existence of two aggravating circumstances to justify imposition of death sentence for first-degree murder, contrary to defendant's assertion that the trial court had improperly doubled the aggravating circumstances. West's F.S.A. 921.141(5)(a, b).

Charles A. Tabacott, Orlando, for appellant.

Jim Smith, Atty. Gen. and Richard W. Prospect, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

Freddie Lee Williams appeals his conviction of first-degree murder and sentence of death. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and we affirm both the conviction and sentence.

The victim was Mary Robinson, Williams' longtime girlfriend. On the night of the murder, the victim went to her sister's house and there received a number of upsetting telephone calls from Williams. After these calls, the victim and her sister



went to jai alai and returned to the Williams-Robinson apartment around eleven o'clock. The sister left; Williams soon arrived and shortly thereafter called the sister to report that something had happened to the victim. When the sister returned, the police were already present.

Earlier that evening, Williams had borrowed a neighbor's handgun, telling him that he was going gambling. He testified that he left the gun on the dresser in a bedroom at home when he went out and that upon his return, the victim staggered toward him, already shot. He called the police and an ambulance. He also testified he did not want the police to find the weapon in his possession since he was on parole; he thus went into the bedroom and took the pistol from the dresser and threw it outside under a bush.

The state's case revolved around longstanding domestic arguments between Williams and the victim and in particular Williams' anger over the victim's supposedly taking a shower that night, a sign he took to mean that the victim was cleaning up after being with a boyfriend.

After the conviction, the jury voted to recommend the death penalty. Upon finding two aggravating circumstances and nothing in mitigation, the trial court imposed a sentence of death.

Williams argues twelve issues on this appeal. We discuss only three; the remaining have been carefully considered and are found to be devoid of merit.

Williams first argues that the evidence is insufficient to support a verdict of first-degree murder. He asserts that the element that was not proved to the satisfaction of sufficiency of evidence standards was premeditation. He claims this is significant given the fact that there was no evidence of, nor did the prosecution argue, felony murder.

[1] The proper role that this Court plays in capital cases has been enunciated in *Tibbs v. State*, 397 So.2d 1120 (Fla.1981), *aff'd*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). There we said that

an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment.

397 So.2d at 1123 (footnotes omitted). See also *Spinkellink v. State*, 313 So.2d 666 (Fla. 1975), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). It is our function, then, to see if there is substantial, competent evidence to support this verdict. We find there is.

[2] Resolving all conflicts in favor of the jury verdict, we find that the record is sufficient to find premeditation beyond a reasonable doubt. The jury was told that the telephone conversations between the victim and Williams were upsetting to the victim. There was evidence of a prior stormy relationship between the victim and Williams. And, most significantly, the jury was told that Williams borrowed a pistol that evening prior to the shooting and then complained to a friend that the victim was washing up after being with another man. We have stated elsewhere that

A premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of some reflection and deliberation on the part of the party entertaining it, and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of



the consequence of carrying such purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formation of the intent. *McCutchen v. State*, 96 So.2d 152, 153 (Fla. 1957). We think that under the facts of the instant case, there clearly was sufficient time before the killing for Williams to have formed a premeditated design, and the borrowing of the gun and the statements made by Williams about his anger at the victim cleaning up bear this out.

[3] This Court is not unmindful that "where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." *McArthur v. State*, 351 So.2d 972, 976 n. 12 (Fla.1977). See also *Jaramillo v. State*, 417 So.2d 257 (Fla.1982). At trial, the sole theory of defense was that the crime was committed by an unknown assailant. According to Williams, the victim was already wounded when he entered the apartment and he claimed he tried to help her. The state established by ballistics tests that the pistol Williams had borrowed was the murder weapon. The physical evidence presented at trial shows that Williams' story about an unknown murderer as well as the circumstances surrounding the disposal of the gun is clearly unreasonable. Williams did not present any reasonable hypothesis of innocence. The jury could properly conclude that Williams was not telling the truth and, given the evidence, that Williams' act represented premeditated murder.

Defense counsel in closing argument suggested that the evidence showed, at most, second-degree murder and that this killing could have been a domestic heat-of-passion murder. The jury could properly find otherwise based on what the evidence did not show. There was no evidence of any struggle or commotion or any facts which might suggest a confrontation of any physical or violent nature between the victim and Williams. Given the location of the victim

crouching on the corner of the bed when she was shot, the presence of toothpaste and a toothbrush on the bed, and the fact that the gunshot wound was not suffered at close range, the jury could have found that Williams confronted the victim while she was brushing her teeth causing her to move to the bedroom. He then shot her once in the side of the neck while her head was turned away from him and while her arm was raised in a defensive posture. The fact that the victim was only shot once is not dispositive of lack of premeditation since, in this case, the wound was in the neck region and immediately caused massive and visible loss of spurting blood. While it was within the province of the jury to find second-degree murder in this case, despite appellant's claim of innocence, we cannot say that the evidence, including the physical facts, is such that the jury was precluded, as a matter of law, from finding first-degree murder.

We hold, then, that the jury could properly find the element of premeditation in this murder and that there was both substantial and competent evidence to support this.

[4] Williams next argues that the trial court erred in refusing to give his instruction on circumstantial evidence. He relies on *McCall v. State*, 116 Fla. 179, 156 So. 325 (1934), overruled, *State v. Anderson*, 270 So.2d 353 (Fla.1972), as stated in *Miller v. State*, 403 So.2d 1014 (Fla. 5th DCA 1981), petition denied, 412 So.2d 468 (Fla.1982); *Leavine v. State*, 109 Fla. 447, 147 So. 897 (1933), overruled, *State v. Anderson*, 270 So.2d 353 (Fla.1972), as stated in *Miller v. State*, 403 So.2d 1014 (Fla. 5th DCA 1981), petition denied, 412 So.2d 468 (Fla.1982); *Perez v. State*, 371 So.2d 714 (Fla. 2d DCA 1979); *Lee v. State*, 362 So.2d 692 (Fla. 4th DCA 1978); and *Newsome v. State*, 355 So.2d 483 (Fla. 2d DCA 1978), disagreed with, *Miller v. State*, 403 So.2d 1014 (Fla. 5th DCA 1981), petition denied, 412 So.2d 468 (Fla.1982), for the proposition that an instruction on circumstantial evidence is required where the prosecution relies solely on circumstantial evidence to prove an essential element of the offense charged. We

agree, but we also find that those cases precede our recent opinion revising the standard jury instructions. See *In re Standard Jury Instructions in Criminal Cases*, 431 So.2d 594 (Fla.1981). There we explicitly stated that the circumstantial evidence instruction is now unnecessary because the instructions on reasonable doubt and burden of proof are sufficient to properly instruct the jury and a separate instruction solely on circumstantial evidence would be duplicative.

Williams argues that the standard jury instructions are flexible guidelines and not inflexible rules and that the trial court still should have given the "old" circumstantial evidence instruction since circumstantial evidence was so prominent in this case. We appreciated this possibility when we noted in our jury instruction revision opinion that "[t]he elimination of the current standard instruction on circumstantial evidence does not totally prohibit such an instruction if a trial judge, in his or her discretion, feels that such is necessary under the peculiar facts of a specific case." *Id.* at 595. In the case sub judice, the trial court in its discretion felt the extra instruction was unnecessary. We will not disturb the action of the lower court in the exercise of its judicial discretion unless palpable abuse of this discretion is clearly shown from the record. Williams has not shown the trial judge's action to be abusive of his discretion.

Williams' final point relates to the sentence of death. He argues that the death sentence is unwarranted when this case is compared to similar cases and especially to those cases where the sentence of death is overturned and a life sentence mandated. He also argues that the trial court erred by doubling the aggravating circumstances.

The trial court's findings of fact included the following:

There are nine aggravating circumstances set out in Florida Statutes 921.41(5) (sic).

A review of the aggravating circumstances prescribed by statute shows that there are two aggravating circumstances

present. These are Subsections (a) and (b) and are as follows:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or [of] a felony involving the use of (sic) threat or (sic) violence to the person.

Regarding aggravating circumstance (a), the Defendant was under sentence of imprisonment when he committed the murder for which he was convicted in this case. In Count Two of Orange County Case Number CR74-3442, the Defendant pled guilty to possession of a firearm by a convicted felon, and on June 6, 1975 was sentenced to 10 years imprisonment. That at the time the murder in this case was committed the Defendant was still on parole. A person on parole is still under sentence of imprisonment. *Aldridge v. State of Florida*, 351 So.2d 942.

Regarding aggravating circumstance (b), the Defendant had been previously convicted of a felony involving the use or threat of violence to another. In Orange County Case Number 71-1551 the Defendant pled guilty to aggravated assault and was sentenced to 5 years imprisonment. In Count One of Orange County Case Number CR74-3442 the Defendant pled guilty to aggravated assault. In both of these aggravated assault cases Freddie Lee Williams shot his victims.

The other aggravating circumstances prescribed by statute are not present.

The Court has carefully considered the mitigating circumstances prescribed by Statute and finds none to be present.

At the penalty phase trial the defendant presented evidence from relatives and friends that he is a good person and that he was kind to them. This evidence does not rise to a non-statutory mitigating circumstance which could offset the aggravating circumstances.

[5, 6] Williams argues that it is a duty of this Court to make a proportionality de-

termination and decide how this case compares with other cases. We agree. *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). "[W]e compare the case under review with all past capital cases to determine whether or not the punishment is too great." 392 So.2d at 1331. This we have done. We conclude that the sentence imposed here is not comparatively inappropriate and thus is proper.

Williams cites *Phippen v. State*, 389 So.2d 991 (Fla.1980); *Brown v. State*, 367 So.2d 616 (Fla.1979); *McCaskill v. State*, 344 So.2d 1276 (Fla.1977); *Chambers v. State*, 339 So.2d 204 (Fla.1976); and *Tedder v. State*, 322 So.2d 908 (Fla.1975), as decisions wherein this Court has reduced a death sentence to one of life imprisonment under circumstances seemingly more serious than those in the present case. These cases are not only factually inapposite, but each was a jury override, a situation where the trial judge pronounced a sentence of death after the jury by majority vote has recommended a life sentence. Factors and considerations were thus present in those cited cases that are absent in the one sub judice.

Likewise, Williams cites *Blair v. State*, 406 So.2d 1103 (Fla.1981); *Kampff v. State*, 371 So.2d 1007 (Fla.1979); and *Halliwell v. State*, 323 So.2d 557 (Fla.1975), as examples where this Court has reduced a sentence of death to one of life even after the jury recommended death. These cases are inapposite, however. In *Blair*, the trial judge improperly included several aggravating factors; since there was a mitigating factor, this Court vacated the death sentence. In *Kampff*, all of the trial court's findings of aggravating factors were found to be in error; since there were at least two mitigating factors, the sentence of death was improper. Finally, in *Halliwell*, the sole aggravating circumstance was found not to apply; the presence of numerous mitigating factors warranted the reduction of the sentence from death to life imprisonment. While all three of these cases involved a domestic dispute, as does the instant case, the rationale for the overturning of the death sentences in each was error in the

aggravation/mitigation equation and not the fact of the domestic dispute. Since we hold, immediately below, that there was no error in the trial court's findings of the aggravating factors, Williams' proportionality argument fails.

[7.8] Finally, Williams asserts that the trial court erred by doubling the aggravating circumstances. We disagree. The trial court properly found that Williams was under sentence of imprisonment because of the 1975 Orange County conviction and 10-year sentence. Williams was on parole at the time of this homicide; an actual incarceration is not necessary. *Aldridge v. State*, 351 So.2d 942 (Fla.1977), cert. denied, 439 U.S. 882, 99 S.Ct. 220, 58 L.Ed.2d 194 (1978). This is satisfactory proof of section 921.141(5)(a), Florida Statutes (1979). Similarly, section 921.141(5)(b) was proven by either the 1972 conviction for aggravated assault or by the 1975 aggravated assault conviction. There was no doubling of the aggravating circumstances in this case.

Appellant, Freddie Lee Williams, was properly convicted of first-degree murder. The jury recommended death. The trial court correctly found two aggravating circumstances and nothing in mitigation. We have compared this case to similar cases and have concluded the death sentence is appropriate. Therefore, the judgment of guilty of first-degree murder and the sentence of death are affirmed.

It is so ordered.

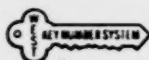
ALDERMAN, C.J., and ADKINS, BOYD, McDONALD and EHRlich, JJ., concur.

OVERTON, J., concurs in part and dissents in part with an opinion.

OVERTON, Justice, concurring in part, dissenting in part.

I concur with the conviction. I dissent from the imposition of the death sentence. In my judgment, proportionate review with other cases requires a reduction of the sentence to life imprisonment without parole for twenty-five years. I disagree with the majority opinion that this case is factually

inapposite from *Blair v. State*, 406 So.2d 1103 (Fla.1981); *Phippen v. State*, 389 So.2d 991 (Fla.1980); *Kampff v. State*, 371 So.2d 1007 (Fla.1979); *Brown v. State*, 367 So.2d 616 (Fla.1979); *McCaskill v. State*, 344 So.2d 1276 (Fla.1977); *Chambers v. State*, 339 So.2d 204 (Fla.1976); *Halliwell v. State*, 323 So.2d 557 (Fla.1975); and *Tedder v. State*, 322 So.2d 908 (Fla.1975). Those cases must be used to properly evaluate the proportionality of the death sentence in this case.



John MICHAEL, Appellant,

v.

STATE of Florida, Appellee.

No. 60712.

Supreme Court of Florida.

July 14, 1983.

Rehearing Denied Sept. 29, 1983.

Defendant was convicted before the Circuit Court in and for Pinellas County, B.J. Driver, J., of first-degree murder and was sentenced to death. The defendant appealed. The Supreme Court, held that: (1) where defendant, who was in custody at time, confessed to cell mates prior to first time any law enforcement agent talked with cell mates about investigation concerning defendant, defendant's incriminating statements to cell mates were admissible at trial; (2) evidence was sufficient to support conviction; (3) trial court did not err in admitting letter that defendant wrote to cell mate, to whom defendant had confessed murder, concerning his love and homosexual desires for cell mate in view of fact that defendant's homosexual preferences were already before jury and letter was relevant in determining voluntariness of defendant's confession to cell mate; (4) evidence was

sufficient to support trial court's finding that aggravating factor that defendant committed murder in cold, calculated, and premeditated manner was proven beyond a reasonable doubt; and (5) evidence was sufficient to support finding that aggravating factor that murder was committed for pecuniary gain was proven beyond a reasonable doubt.

Affirmed.

#### 1. Criminal Law $\Leftarrow$ 641.12(1)

Where defendant, who was in custody after being indicted for first-degree murder, confessed to cell mates prior to first time any law enforcement agent talked with cell mates about investigation concerning defendant, defendant's incriminating statements to cell mates were admissible at trial.

#### 2. Homicide $\Leftarrow$ 253(1)

Evidence, including defendant's confessions to cell mates, was sufficient to sustain conviction of first-degree murder.

#### 3. Searches and Seizures $\Leftarrow$ 3.6(4)

Sufficient probable cause existed to support issuance of search warrant to search house trailer defendant shared with murder victim.

#### 4. Searches and Seizures $\Leftarrow$ 3.8(2)

Police searching house trailer shared by defendant and murder victim under authority of properly issued search warrant had authority to search contents of small box found in trailer for possible evidence of crime, so that discovery and use of will found inside box in subsequent prosecution for murder was proper.

#### 5. Criminal Law $\Leftarrow$ 433

In murder prosecution, trial court did not err in admitting letter that defendant wrote to cell mate, to whom defendant had confessed murder, concerning his love and homosexual desires for cell mate in view of fact that defendant's homosexual preferences were already before jury and letter was relevant in determining voluntariness of defendant's confession to cell mate.

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1983

ORIGINAL

No. \_\_\_\_\_

83-6184

\_\_\_\_\_  
FREDDIE LEE WILLIAMS,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.  
\_\_\_\_\_

Supreme Court, U.S.


FILED

DEC 23 1983

Alexander L. Stevas, Clerk

MOTION TO PROCEED IN FORMA PAUPERIS

The Petitioner, FREDDIE LEE WILLIAMS, by and through his undersigned counsel, asks leave of this Honorable Court to proceed in forma pauperis pursuant to Rule 46. Attached hereto is an affidavit from the Petitioner, who is presently incarcerated at Florida State Penitentiary, Starke, Florida.

  
\_\_\_\_\_  
CHANDLER R. MULLER

Muller, Kirkconnell and  
Lindsey, P.A.

1150 Louisiana Avenue, Suite 19  
Post Office Box 2728  
Winter Park, Florida 32790  
Telephone: (305) 645-3000

Attorney for the Petitioner.

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. \_\_\_\_\_

RECEIVED

MAR 2 1984

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

FREDDIE LEE WILLIAMS,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

83-6184

**ORIGINAL**

AFFIDAVIT IN SUPPORT OF MOTION  
TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, FREDDIE LEE WILLIAMS, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

A. Whether the failure of the Florida Supreme Court to consider non-statutory but judicially recognized mitigating circumstances when conducting a proportionality review of the applicability of a death sentence constitutes excessive and disproportion of punishment forbidden by the Eighth and Fourteenth Amendments, and constitutes an equal protection violation under the Fourteenth Amendment.

B. Whether the Florida Supreme Court failed to perform a constitutionally adequate proportionality review since Petitioner's case was factually inapposite from



several other Florida Supreme Court cases where it was held that the death penalty would constitute excessive and disproportionate punishment forbidden by the Eighth and Fourteenth Amendments.

C. Whether the Florida Supreme Court by considering the Petitioner's parole status at the time of the offense and his prior conviction as two (2) separate aggravating circumstances constitutes an improper doubling of aggravating circumstances resulting in excessive and disproportionate punishment forbidden by the Eighth and Fourteenth Amendments.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received. I cannot remember but it has been several years since I was last employed.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No.

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding

ordinary household furnishings and clothing)? No.

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None presently.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

FREDDIE LEE WILLIAMS

SUBSCRIBED AND SWORN TO  
before me this \_\_\_\_\_ day  
of February, 1984.

NOTARY PUBLIC, STATE OF FLORIDA  
My Commission Expires Sept. 25, 1987

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

SUPREME COURT JUDGE



IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. \_\_\_\_\_

83-6184

FREDDIE LEE WILLIAMS,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

Supreme Court, U.S.

FILED

DEC 28 1983

Alexander L. Stevas, Clerk

AFFIDAVIT

STATE OF FLORIDA

COUNTY OF ORANGE

CHANDLER R. MULLER, being duly sworn, states:

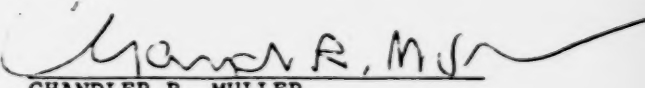
1. I am an attorney for FREDDIE LEE WILLIAMS, the Petitioner in the above-captioned action, and I make this affidavit in support of Mr. Williams' motion for leave to proceed in forma pauperis. My representation of Mr. Williams is without remuneration.

2. An in forma pauperis affidavit signed by Mr. Williams is attached hereto.

3. Counsel was appointed to represent Mr. Williams at his trial and on appeal.

4. I am informed and believe that because of his poverty, Mr. Williams is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Williams is entitled to redress in this action.

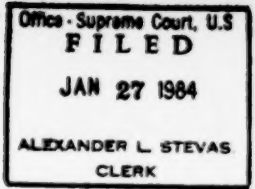
  
CHANDLER R. MULLER

Sworn to before me this  
\_\_\_\_ day of January, 1984.

NOTARY PUBLIC  
State of Florida at Large  
My Commission Expires:

Notary Public, State of Florida  
My Commission Expires July 31, 1987  
Notary Public Seal - State of Florida

83-6184



NO. A-382

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

---

FREDDIE LEE WILLIAMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

---

---

RESPONSE TO

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF FLORIDA

---

---

JIM SMITH  
ATTORNEY GENERAL

RICHARD W. PROSPECT  
ASSISTANT ATTORNEY GENERAL

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Daytona Beach, Florida 32014  
(904) 252-1067

COUNSEL FOR RESPONDENT

QUESTION PRESENTED

WHETHER THE PROPRIETY OF THE IMPOSITION  
OF THE DEATH PENALTY WAS EITHER RAISED  
OR DECIDED AS A FEDERAL QUESTION BELOW.

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### STATEMENT OF THE CASE

In addition to those facts stated by Petitioner and those found in the opinion of the Florida Supreme Court, the following should be considered.

Rosa Lee Jones, a friend of both the Petitioner and the victim, gave Petitioner a ride to the victim's apartment. Upon arrival, Petitioner attempted to show Jones a gun that he had in his possession. (R-315) Petitioner then went into the apartment to retrieve a cassette tape and upon returning to Jones' car, told her that the victim was taking a shower. (R 321) Jones called the victim and thought she heard a response. (R 321) A neighbor heard a female voice calling the victim and heard the victim reply, "I'm in the bathroom." (R-274) Jones testified that Petitioner appeared to be a little upset when he mumbled that the victim was probably washing up from being with a boyfriend. (R-322) As Jones drove off, Petitioner was closing the door to the apartment. (R-324)

There was no evidence of any forced entry into the apartment. (R-463) The back door was locked from the inside and was also blocked on the outside by a dog and her puppies lying on a mattress. (R-463)

Another neighbor testified that approximately five minutes after a car was heard leaving, a "pop" sound was heard. (R-298)

On January 2, 1975, a two-count information in case no. 74-3442 was filed in the Circuit Court in and for the Ninth Judicial Circuit, Orange County, Florida, charging the Petitioner in Count I with assault with intent to commit a felony in that the Petitioner did make an assault on Mary Elizabeth Robinson with a handgun and in futherance thereof did shoot and wound Mary Elizabeth Robinson. (State's exhibit 115; App. 75) On June 6, 1975, the Petitioner, in response to Count I, entered his guilty plea to aggravated assault. (State's exhibit 115; App. 76). This crime was specifically acknowledged during the advisory proceeding when a motion in limine was being argued



seeking to prevent that very fact from going before the jury. Petitioner contended that if the jury knew that, " . . . he's hurt this girl before . . ." it would be prejudicial and inflammatory. (R-764) Petitioner sought to stipulate only to the fact that he had been previously convicted of two prior felonies, each of which involved the use of violence to the person. (R-762) The facts of the prior shooting, albeit brief, were specifically discussed by the prosecutor and defense counsel. (R-770-771) This earlier shooting of the victim was mentioned by the prosecution and acknowledged by defense counsel during arguments to the jury. (R-830)

#### REASONS FOR NOT GRANTING THE WRIT

First, it is necessary to examine that part of the petition setting forth the Petitioner's contention of how the federal questions were raised and decided below. (Petition, pp. 5-6)

As to the first question, Petitioner claims that it was raised during the advisory sentencing proceeding, specifically in his brief on direct appeal, and generally in the dissenting opinion. We disagree. Whether the Florida Supreme Court's alleged failure to consider non-statutory mitigating circumstances constituted excessive and disproportionate punishment in violation of the Eighth and Fourteenth Amendments was never raised below. Indeed, that such a proposition was advanced during the advisory sentencing proceeding in the trial court is specifically denied as a matter of reason and is considered facially absurd. How could Petitioner possibly have presented the trial court with an issue which did not exist and could not have had existed until subsequent appellate litigation?

The only thing presented during the advisory proceedings which would give rise to any justiciable issue was a last minute oral motion in limine seeking to prevent the state from presenting evidence of and relying upon certain statutory aggravating factors. Petitioner objected to any reliance upon the factor that the capital murder was committed by a person under sentence of imprisonment, contending that "imprisonment" did not refer to

someone who was on parole. (R-761) He, however acknowledged state case law to the contrary. (R-761)

As stated earlier, Petitioner also objected to the use of particular facts supporting the aggravating factor that he had been previously convicted of other felonies involving the use of violence to the person. (R-762) The substance of this claim was that although he was prepared to stipulate to that fact, he did not want the jury to know that the prior felonies involved the use of a handgun and most specifically, that one of the prior felonies involved the shooting of the very same victim in this case. Parenthetically, Petitioner was successful in having only the respective informations and judgments and sentences in the previous felonies entered without any evidence of the factual bases for each.

Attached in an appendix to this response is the brief of appellant filed in the Florida Supreme Court. As can be seen in the argument pertinent to the issue surrounding the death penalty, Petitioner presented the essential argument that once a review of prior cases was conducted in terms of proportionality, the facts and circumstances of his case did not warrant imposition of the death penalty. There also was argument presented regarding a doubling of aggravating circumstances, the burden of proof of aggravating circumstances, and a miscellaneous section dealing with a constitutional attack of Florida's death penalty statute. (For the Court's convenience the motion referred thereto is also included in the appendix. App. 62-67)\*

All arguments directed to the imposition of the death sentence were based on state law as expressed in the decisions of the Florida Supreme Court only.

In fact, the only argument which could be remotely considered as one asserting error that evidence of mitigation was not considered is that appearing on page 35 of Petitioner's

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\* A perfunctory argument also appears under Point IX in Petitioner's brief directed to an allegation of unconstitutionality of §922.10, Fla. Stat. That law directs that a death sentence in the State of Florida shall be carried out by electrocution. The referenced motion is also included in the appendix. (App. 68-70)

brief which merely complains that evidence of mitigation was dismissed in an " . . . offhand fashion . . . without any explanation . . . ." That statement is somewhat misleading since an examination of the trial court's findings of fact and sentencing order (App. 71-74) shows that the trial court made mention of evidence from relatives and friends that Petitioner was a good person and that he was kind. The trial court stated: "This evidence does not rise to a statutory mitigating circumstance which could offset the aggravating circumstances." (R-1371) This statement does not indicate that the evidence was dismissed; it indicates only that after considering that evidence, the court was of the opinion that it did not outweigh the evidence in aggravation. In any event, the treatment of the non-statutory mitigating evidence by the trial court was not challenged on a federal basis and the issue was not presented to the Florida Supreme Court in the posture that an approval of the sentence would violate the Eighth and Fourteenth Amendments to the United States Constitution.

We are confident that the Court is fully aware of its decisions to the effect that federal constitutional issues raised here but not presented to the state courts will not be decided. Cardinale v. Louisiana, 394 U.S. 437 (1969). Similarly, in Street v. New York, 394 U.S. 576 (1969), this Court declared that when the highest court of the state failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts unless the aggrieved party can affirmatively show otherwise. See also, Fuller v. Oregon, 417 U.S. 40 (1974); Herndon v. Georgia, 295 U.S. 441 (1935); Beck v. Washington, 369 U.S. 541 (1962).

To assert that a federal question was raised by virtue of a dissenting opinion is likewise a bewildering notion. We cannot accept the proposition that the failure to specifically raise an issue is somehow excused by virtue of a dissenting opinion which does nothing more than disagree with a majority that the facts in this case were different from others previously reviewed.

Contrary to Petitioner's assertion, the Florida Supreme Court's review of this case was not constitutionally lacking. The court considered the cases Petitioner relied upon and made compelling determinations that the cases were either factually or legally inapposite, or both. As the court noted, the cases of Phippen v. State, 389 So.2d 991 (Fla. 1980); Brown v. State, 367 So.2d 616 (Fla. 1979); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); and Tedder v. State, 322 So.2d 908 (Fla. 1975), were not only factually dissimilar, but also involved an override of a jury recommendation of life imprisonment. Williams v. State, 437 So.2d 133,137 (Fla. 1983).

Likewise, the court considered Blair v. State, 406 So.2d 1103 (Fla. 1981); Kampff v. State, 371 So.2d 1007 (Fla. 1979); and Halliwell v. State, 323 So.2d 557 (Fla. 1975), and provided more than adequate distinguishment of the three. Blair, supra, involved the improper inclusion of several aggravating factors and since mitigating circumstance was present, the court reduced the death sentence. In Kampff, supra, all of the findings with regard to aggravating factors were found to be in error and once again, in the presence of circumstances in mitigation, the sentence was reduced. In Halliwell, supra, the only aggravating circumstance was found not to apply and the presence of numerous mitigating circumstances obviously outweighed that which did not exist and thus, the sentence was reduced. Williams v. State, Id.

The court went on to point out that the reductions of sentences in the preceding cases were a direct result of legal errors occurring in the weighing process and not of the particular facts of the domestic disputes involved.

Petitioner's second question is phrased as a complaint about the failure to perform adequate proportionality review. (The threshold question of whether the constitution requires proportionality review is currently before the Court. Pulley v. Harris, No. 82-1095) Petitioner must and does acknowledge that he received such review but seeks to have the conclusions reached overruled. Past his disagreement with those conclusions, he

presents no sufficient reason to do so.

That Florida's capital sentencing scheme is constitutional was of course recognized in Proffitt v. Florida, 428 U.S. 242 (1976). It was specifically noted that the final constitutional check on a death sentence was provided by the Florida Supreme Court to ensure that similar results are reached in similar cases. Review of those findings is limited to the question of whether they are so unprincipled or arbitrary as to somehow violate the United States Constitution. Barclay v. Florida, \_\_\_ U.S. \_\_\_, 103 S.Ct. 3418 (1983). This, Petitioner has failed to even argue, much less demonstrate.

The last question Petitioner presents deals with an alleged claim directed to a "doubling" of circumstances. We repeat that an examination of the issue as presented to the state court fails to show that it was presented in a federal context. On page 35 of his brief to the Florida Supreme Court, Petitioner presented only weak argument that under his interpretation of state law, the fact that he was on parole for felonies involving violence should represent but one factor in aggravation. On this point, the Florida Supreme Court applied state law, [Aldridge v. State, 351 So.2d 942 (Fla. 1977); see also, Straight v. State, 397 So.2d 903 (Fla. 1981); Tafero v. State, 403 So.2d 335 (Fla. 1981); White v. State, 403 So.2d 331 (Fla. 1981); Jones v. State, 411 So.2d 165 (Fla. 1982)] to determine that the fact of parole for the 1975 conviction satisfied one statutory factor and that either the 1972 or 1975 conviction would satisfy the other statutory factor. This is a determination of a state court based on a state law which has been approved by this Court. No federal question was presented or decided.

## CONCLUSION

Even assuming that the questions presented for review were properly raised and decided in a federal context in the court below, the essence of the instant petition is nothing more than a request that this Court review, de novo, determinations of a state court with which the Petitioner happens to disagree. Petitioner was fairly tried for eventually murdering someone whom he had shot before. When facing the issue of sentence, he could only present evidence that he essentially was a good person. This evidence hardly outweighed the evidence in aggravation, if it had any weight at all. The trial court rejected the state's argument that four factors in aggravation had been shown and instead relied on but two statutory factors which were supported by competent, sufficient evidence. The trial court performed its statutory duty and concluded that the sentence of death was appropriate. The Florida Supreme Court, conducting a proportionality review in light of similar cases previously decided, properly approved that finding. Petitioner has shown no reason why that determination should be disturbed. Accordingly, the writ of certiorari to the Florida Supreme Court should be denied.

Respectfully submitted,

January 24, 1984

Richard W. Prospect



NO. A-382

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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FREDDIE LEE WILLIAMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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APPENDIX

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**RECEIVED**

**MAY 13 1982**

**ATTORNEY GENERAL  
DAYTONA BEACH, FLA.**

**IN THE SUPREME COURT OF FLORIDA**

**FREDDIE LEE WILLIAMS**

**Appellant**

**vs.**

**CASE NO. 61,549**

**STATE OF FLORIDA**

**Appellee**

\_\_\_\_\_ /

**INITIAL BRIEF OF APPELLANT**

**On Appeal From the Circuit Court of the  
9th Judicial Circuit of Florida, In and  
For Orange County.**

**CHARLES A. TABSCOTT, ESQUIRE  
46 Park Lake Street  
Orlando, Florida 32803  
(305) 841-6739**

**Counsel for Appellant**

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### PRELIMINARY STATEMENT

Appellant was the Defendant below and Appellee was the Plaintiff, State of Florida, in a criminal action. In this brief, the parties will be referred to as they appear before this Court.

Since all documents and transcripts are numbered consecutively with separate numbers, only one symbol, "R" denoting the record on appeal, will be used.

## STATEMENT OF THE CASE

Appellant was arrested for first degree murder on November 10, 1980 (R 1072-1074). A preliminary hearing was conducted, probable cause was found and Appellant was held to answer the charges on November 26, 1980 (R 1078-1080). Appellant was indicted on January 29, 1981 for first degree murder (R 1084).

A written plea of not guilty and a notice of appearance was filed by private counsel on December 3, 1980, (R 1083). On March 23, 1981 said private counsel was allowed to withdraw (R 1134) and on April 1, 1981 the Public Defender appeared for Appellant (R 1170).

Trial by jury was conducted on October 12 through October 16, 1981 (R 1-746) with a finding of guilty as charged by the jury (R 739-740, 1332). The advisory phase of the trial was conducted on October 20, 1981 (R 758-848) with the jury recommending the death sentence (R 843-845, 1336). Appellant was sentenced to death on December 18, 1981 (R 849-862, 1369-1372, 1373-1374).

This appeal was timely initiated by filing a Notice of Appeal on December 23, 1981 (R 1380) and an Amended Notice of Appeal on December 29, 1981 (R 1385). The Public Defender was allowed to withdraw on February 11, 1982 (R 1404) and the undersigned attorney was appointed to represent Appellant on February 12, 1982 (R 1406).



## STATEMENT OF THE FACTS

This case involves the death of one Mary Robinson, with whom Appellant lived at the time of the alleged crime and off and on for 18 years (R 227-230). The Appellee's case was divided into two basic areas. The first area consists of testimony of acquaintances of Appellant and the deceased. The second area involves technical witnesses and police officers.

On the evening in question, Ada Mae Robinson, the sister of the deceased, testified that she and the deceased decided to go to Jai Alai. Prior to departing for Jai Alai the victim was present at Ada's house and received three telephone calls from Appellant. After the calls the deceased looked sad (R 229-231). They then went to Jai Alai and returned to the deceased's residence sometime after eleven o'clock. Ada then returned to her home (R 231-235). Shortly thereafter Appellant called Ada to say something happened to Mary (the deceased). So Ada returned to the deceased's apartment, at which time police and rescue personnel were already present. She described Appellant as screaming (R 236-239).

Next William Peterson testified. He was the next door neighbor of Appellant and the victim. Mr. Peterson testified that earlier that evening he had lent his gun to Appellant, as he had done at least three prior times. Appellant said he needed the gun because he was going to "make money",

meaning he was going gambling (R 244-250, 259). Later that evening while in his apartment he heard the deceased come home. A short time later he heard a second car come up and heard Appellant's voice (R 251-253). A few minutes later he heard Appellant say "Mary, Mary, Mary". Appellant then came to Mr. Peterson's apartment, said something happened to Mary and asked the Peterson's to call the police (R 255-256). This witness identified the gun (later identified as the gun which expelled the bullet, found in Appellant's apartment (R 618-624)) that he had loaned the Appellant (R 257). Mr. Peterson testified that when he saw Appellant and the deceased earlier that evening they were not fighting or arguing. In fact, he and Appellant socialized that evening when the gun was loaned and Appellant was not upset (R 259- 263).

Peggy Peterson, the wife of the previous witness, testified that she was watching the eleven o'clock news when she heard a car bring the deceased home. About five minutes later she heard a second car arrive (R 272-276). About thirty minutes later Appellant appeared at her door, asked her to call the police and she complied. She noticed blood on Appellant (R 276-277).

Gloria Davis, another neighbor, testified that on the evening in question, she heard the victim and her sister arrive in a car, then her own boyfriend arrived in his car, and then heard a third car arrive and leave. The witness then

went to bed and thereafter heard a "pop sound". About two or three minutes after the pop she heard Appellant in a loud voice call "Mary asking what was wrong" (R 293-296).

Rosa Lee Jones, testified that she and Appellant had known each other since childhood and considered each other cousins. They were close friends or in a brother-sister relationship. They never dated each other. This witness was also a friend of the deceased (R 312-313, 325). Ms. Jones and Appellant met on the night in question. During their conversation that evening, Appellant mentioned that the deceased would probably come home arguing and that he would get a room that night. He also mentioned during the course of their conversation that he had a gun (this witness did not see the gun), but there was no indication he intended to use it (R 315-316, 328). When Appellant talked about Mary that night he did not seem mad (R 327). Appellant had been drinking but he was not drunk (R 318-319). She took Appellant to the apartment that night. She hollered out to Mary (the deceased) and thought she heard Mary say "yeah". Appellant said to this witness she (Mary) was in the shower and he "mumbled something that she must be trying to clean up from something. I don't know whether it was with a boyfriend or what he mumbled. He mumbled something" (R 318-322, quote at 322). She did not remember his exact words (R 332). At this point Appellant appeared a "little" upset, but the witness was not paying much attention to that (R322, 332). Witness

Jones then departed (R 323).

In the second phase of testimony a number of police officers and technical witnesses were called to testify. Police Officer Cheryl Felski was the first officer to respond to the scene of the crime. When she arrived, the paramedics were already present working on the deceased in the apartment. Appellant was also present in the room with the deceased and he did not want to leave her (R 343-346, 356). This witness observed blood "all over" Appellant (R 347). Appellant stated to her that when he came home Mary was there, fell toward him, he noticed blood on her and he reported the incident (R 349). This witness also overheard Appellant tell Ada Robinson that the victim had been shot (R 350).

Witness Randolph Joslyn took a number of photographs which were admitted into evidence over objection of Appellant (R 374-375). These 48 photographs all depict a large amount of blood (State's Exhibits 11-58). The witness himself made numerous references to the fact that many of the pictures were duplicitous (R 378, 379, 380, 382, 384, 389, 390, 394).

Arthur Wilson, a police officer, testified that he obtained a statement from Appellant after giving him his Miranda warnings. The Appellant told him that when he arrived home the screen door was partially open. He then unlocked the door and went inside when Mary came from the back

room, said his name and fell into his arms. He saw and felt a wet substance. He laid her on the sofa and went outside to call for help. He then went back inside and used a telephone to call for help (R 429-433). This statement was taped, which tape was played to the jury (R 433-435). A transcript of the tape was also admitted into evidence (R 437-438 and State's Exhibit 62). Appellant also told Officer Wilson that he didn't know anything about a gun and he "didn't want to talk to us any more ." (R 438).

Edward Mullis was the lead investigator in the case. His testimony was used primarily to discuss and introduce a number of items of physical evidence, including a gun that he found under a bush near the apartment in question and which was admitted into evidence over Appellant's objection (R 449-488). Officer Mullis directed that a gunshot residue test be conducted on Appellant. This test attempts to determine if someone has fired a weapon (R 489).

Dr. Thomas Hegert, the medical examiner, testified that the victim died of a single gunshot wound to the neck which severed the artery causing massive bleeding (R 510). The victim's blood revealed 155 milligrams of alcohol, indicating that she was "under the influence of alcohol." (R 513).

One Judy Bunker was allowed to testify as an expert witness in bloodstain splatter analysis (R 532-533). In her opinion, based upon viewing the scene and photographs of the scene, her findings are "consistant with" the victim being shot

while on a bed in a bedroom, moving off of the bed into a hall, then traveling to the livingroom to the area of the sofa. She also testified because of shoe prints in the blood in the hallway, her findings are consistent with some person other than the victim being in the area. She also testified that in her opinion a handprint in blood was on the front door and blood was on the telephone in the livingroom (R 562-569).

The remainder of the Appellee's case consisted of the testimony of various expert witnesses. Eugene Hitchew testified that he attempted to lift fingerprints from the telephone, but was unsuccessful in doing so (R 581-582). David Baer testified that the deceased had AB type blood and he found human blood on the gun in question, containing blood group factors "A and B" (R 585-588). He also examined a pair of shoes and found factors "AB" (R 588-589). He also examined linoleum and found factors "AB and B" (R 589-590). Witness Terrell W. Kingery examined a pair of shoes, a piece of linoleum and photographs and concluded that the shoes "could have" made the impressions in blood found on the linoleum and that this was not a "positive" finding (R 592-609).

Greg Scala said he examined the gunshot residue test taken from Appellant and was unable to reach a conclusion (R 616). Gary Rathman examined the gun in evidence and a bullet taken from the apartment and concluded the bullet was fired from that gun (R 621-623).

Finally, the Appellant himself testified. He stated he did not shoot the victim. He borrowed the gun from his neighbor, but did not take it from the apartment after Mary had gone to Jai Alai. He went several places that night including to his mother's residence where he saw Rosa Lee Jones. Rosa took him home. When he got inside the apartment, Mary came toward him, he grabbed her, felt warm blood and helped her to the couch. He then went to the door to go outside to call an ambulance. He changed his mind and came back inside to call on his own telephone, which he did. He next went to the neighbor's door and then returned to Mary until the ambulance arrived. He did remove the gun from the apartment and throw it outside because he was on parole. (R 630-667).

During the advisory phase of the trial, the Appellee merely introduced documents showing Appellant's two prior convictions (R 779-782). Appellant produced the following testimony:

Virginia Wilson - She has known Appellant all of his life and knows him to be a person who loves and helps people (R 783-784).

Rosabelle Thompson - She has known Appellant about 16 years and he has always been kind to her and he cares about people (R 785-786).

Gladys Forsyth - She knew Appellant 15 years and he thought of her as a mother. He treated her nice and he



took care of his own children (R 788-789).

Wilbur Johnson - This witness was Appellant's employer. Appellant was a good worker who never posed any problems (R 790-791).

Gussie Lee Williams - This is Appellant's mother. Appellant was born in Alabama and Appellant's father died when Appellant was very young. She and her daughter raised him "the best way I can", the witness having had no education. Appellant has two sons whom this witness helped raise along with Appellant (R 792-794).

Gary Lee Williams - This high school student is the son of Appellant. Appellant is a "good father" who worked and supported this witness (R 795-797).

Mary Lee Williams - Appellant is the brother of this witness. Their father died when she was eight and when Appellant was seven years of age (R 797-799).

Freddie Lee Williams (Appellant) - His father died when Appellant was six years of age, leaving five children. Appellant had three brothers whom he helped raise. He left school in the ninth grade to help support the family. He has done construction work, installation of cables and fruit picking (R 800-802).

## POINT I

### THE EVIDENCE IS NOT SUFFICIENT TO SUPPORT A VERDICT OF FIRST DEGREE MURDER.

In the case at bar there is a total lack of evidence supporting a finding that murder in the first degree occurred. The element that was not proved to the satisfaction of sufficiency of evidence standards was premeditation (there was no evidence of, nor did the prosecution argue, the felony-murder theory).

It is axiomatic that in order to sustain a conviction of first degree murder, the element of premeditation must exist and be proved. §782.04(1)(a) Fla.Stat.(1979) and Miller v. State, 77 So.669 (Fla.1918). Premeditation is to be actually proved and is not to be presumed. As stated by the Court in Miller, supra, page 670:

...the element of premeditation on the part of the accused to kill should be alleged and proved beyond a reasonable doubt. Since the case of Dukes v. State, 14 Fla.499, this court has held that the fact of killing merely does not raise a presumption of premeditation such as makes the offense murder in the first degree... (Emphasis added.)

See also Snipes v. State, 17 So.2d 93 (Fla.1944).

This element of premeditation can be, and in fact almost always is, proved by circumstantial evidence. Larry v. State, 104 So.2d 352 (Fla.1958), Spinkellink v. State, 313 So.2d 666 (Fla.1975) and Phippen v. State, 389 So.2d 991 (Fla.1980). In

the instant case no direct evidence of premeditation exists; hence, it must be proved, if at all, by circumstantial evidence.

Of course, it is the well established rule in this State that in order for a conviction to be sustained on such evidence it must not only be consistent with the defendant's guilt, but it must also be inconsistent with any reasonable hypothesis of innocence. Driggers v. State, 164 So.2d 200 (Fla.1964). This is true even if the hypothesis of guilt is more probable than the hypothesis of innocence. It is only after each hypothesis of innocence has been excluded, can the hypothesis of guilt be considered as proof. Head v. State, 62 So.2d 41 (Fla.1952) and Mayo v. State, 71 So.2d 899 (Fla.1954). In order to warrant a conviction the Court in Lyons v. State, 47 So.2d 541, 542 (Fla.1950) said that the proof:

must be of a conclusive character, pointing directly and unerringly to the accused's guilt beyond a reasonable doubt, and mere suspicion, probabilities or suppositions are insufficient.

Appellant is mindful of the proposition that when he attacks the sufficiency of the evidence, he admits the conclusions most favorable to Appellee and most unfavorable to him. Spinkellink v. State, supra and Parrish v. State, 97 So.2d 356 (Fla. 1st DCA, 1957).

Applying the tests outlined above to the factual situation in the case at bar, the best conclusion that can be reached is that the shot which was fatal to Mary Robinson was in fact fired by Appellant. Appellant is willing to concede that his own testimony can be disregarded entirely; nevertheless there is insufficient evidence to establish under the circumstantial evidence rules that the element of premeditation existed. For that reason the highest degree of crime of which the Appellant should be convicted is second degree murder. There are sufficient reasonable hypotheses indicating innocence as to first degree murder (i.e. lack of premeditation). One may conclude that Appellant did reflect long enough to form a design to kill Mary Robinson. But one could just as readily conclude, for example, that there was no such reflection and the single shot was fired in the heat of an argument or upon sudden provocation. Remember, the deceased was under the influence of alcohol. (R 513).

Before the particular factors of this case are discussed, it is necessary to briefly discuss the difference between first and second degree murder. The major and perhaps only difference between the two degrees of murder is the element of premeditation. As stated in Polk v. State, 179 So.2d 236,237 (Fla. 2 DCA 1965), "the one essential element which distinguishes first-degree murder from second-degree murder is premeditation." Premeditation and intent are not synonymous.

An intent to kill can be present in second degree murder. Polk v. State, supra. The case of Barnhill v. State, 48 So.251, 258 (Fla.1908) stated this proposition as such:

Undoubtedly, in order that the defendant may be convicted of murder in the first degree, he must have acted from or in pursuance of a premeditated design to effect the death of the deceased. A mere intent to kill would not be sufficient. (Emphasis added.)

In accord is Miller v. State, supra.

Required for second degree murder is malice which means ill will, hatred, spite or evil intent. Huntley v. State, 66 So.2d 504 (Fla.1953) and Raneri v. State, 255 So.2d 291 (Fla. 1st DCA, 1971). Thus, it can be seen that second degree murder requires a very serious and evil state of mind.

The effect of a homicide committed in the course of sudden passion or impulse is to reduce the crime from first degree to a lower degree of homicide. In other words, such passion or impulse, even though done with intent, excludes premeditation. Olds v. State, 33 So. 296 (Fla.1902), Whidden v. State, 59 So. 561 (Fla.1912), Forehand v. State, 171 So.241 (Fla.1936) and Smith v. State, 314 So.2d 226 (Fla. 4th DCA, 1975).

So, what is it that lies beyond the intentional act, the malice and the ill will of second degree murder that changes it to first degree murder? It is, of course, the

premeditated design required by the statute, §782.04

(1)(a) Fla.Stat. (1979). The best definition of this is found in McCutchen v. State, 96 So.2d 152, 153 (Fla.1957):

A premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide.

The case of Weaver v. State, 220 So.2d 53, 59 (Fla. 2nd DCA, 1969) discusses the proof necessary to establish pre-meditation:

While it is true that no particular length of time is necessary in order to make the specific intent premeditated, nevertheless some (emphasis by the court) time must have passed, however brief, during which the specific intent is reflected upon or entertained. It necessarily follows that there must be some point from which reasonable minds can compute such a period of time. It is rudimentary, of course, that intent may be inferred from circumstantial evidence. But the point of time at which the specific intent to kill is inferentially formed cannot be left to guesswork and speculation. (Emphasis added.)

It appears that the line separating intent, malice, ill will, hatred from premeditation is a fine one. In the instant case it may well be concluded that the circumstantial evidence rules established this intent, malice, ill will, hatred by Appellant, but it did not go over that fine line into the territory of premeditation.

What factors are to be considered in determining the existence of premeditation with only circumstantial evidence? The oft-cited case of Larry v. State, 104 So.2d 352 (Fla.1958) lists five factors: (1) the nature of the weapon used, (2) the presence or absence of adequate provocation, (3) previous difficulties between the parties, (4) the manner in which the homicide was committed, and (5) the nature and manner of the wounds inflicted. Additional factors gleaned from other cases include (6) prior statements of intent or threats, Hill v. State, 133 So.2d 68 (Fla.1961) and Phippen v. State, 389 So.2d 991 (Fla.1980) and (7) the defendant's actions and disposition of the body after the homicide. Spinkellink v. State, supra and Tedder v. State, 322 So.2d 908 (Fla.1975).

Each of these factors will now be considered in light of the facts of the instant case. Factors (1), (4) and (5) (the nature of the weapon, the manner in which the homicide was committed and the nature of the wounds) listed above are so closely related they must be considered together. These are by far the most frequently used factors by the courts in upholding a finding of premeditation in circumstantial evidence cases. It is necessary to examine a number of the appellate decisions discussing these factors. In each of these cases the courts found that the factors did establish premeditation. It should be noted that some of



these cases involve additional factors discussed later. For the sake of simplicity these cases will be listed.

Larry v. State, supra- A hatchet was used to inflict at least six blows causing the victim's neck to be half severed and the head to be "like crushed ice".

Hill v. State, 133 So.2d 68 (Fla.1961)- Three to five shots were fired during a struggle. Two shots hit the victim and another shot was aimed at a witness.

Hernandez v. State, 273 So.2d 130 (Fla.1973)- The victim was stabbed 14 times.

Prince v. State, 297 So.2d 648 (Fla. 1st DCA 1974)- There existed several gunshot wounds and the victim appeared to have been run over by a vehicle.

Songer v. State, 322 So.2d 481 (Fla.1975)- A "fusillade" of shots was fired with five hitting the victim.

Tedder v. State, 322 So.2d 908 (Fla.1975)- The defendant hid until an opportune time, stepped out, began firing shots and pursued the victim into a residence.

Phippen v. State, 389 So.2d 991 (Fla.1980)- The defendant killed his parents by shooting his father six times and his mother four times with some shots entering their backs. Because of the number of shots the defendant had to reload during the episode.

Mines v. State, 390 So.2d 332 (Fla.1980)- The victim was bound, was beaten and received five knife wounds.

Sireci v. State, 399 So.2d 964 (Fla.1981)-

The defendant inflicted 55 stab wounds to all parts of the body and slit the victim's neck.

Welty v. State, 402 So.2d 1159 (Fla.1981)-

The victim was choked and his larynx and hyoid fractured from repeated blows. Death resulted from strangulation.

McKennon v. State, 403 So.2d 389 (Fla.1981)-

The victim received multiple blows to the head, manual strangulation and multiple wounds to the neck.

It is clear that in each of the above cases, because of the factors involved, premeditation had to exist to at least some extent. The facts in the case at bar concerning the weapon, the nature of wounds and the manner of the homicide are totally unlike any of the above factors. By evaluating the factors in the above cases, it is obvious that each of the perpetrators exercised a number of deliberate acts which must have been reflected on. In the instant case, these factors show only one single act- that of simply pulling a trigger one time. There are no other wounds indicating a struggle. (One other wound existed to the victim's arm, but this was a grazing wound caused by the same bullet that killed the victim (R-510,516).) The medical examiner testified that no gunpowder burns existed on the victim, indicating the gun was at least two and a half feet away when it fired (R 518-519). This eliminates any close range, execution type of killing.

The second factor involves the presence or absence of adequate provocation. The Larry, supra, case does not expound on this point and no cases could be found which dealt with this as one of the factors establishing premeditation.

The next factor to be considered is previous difficulties between the parties. An example of this factor is found in Kampff v. State, 371 So.2d 1007 (Fla.1979). That case involved the killing of the defendant's ex-wife. There was testimony of the defendant's "continual harassment" of the wife after the divorce. There is no such testimony in the instant case. Only three witnesses testified to anything remotely connected with the point. Peggy Peterson, a neighbor of Appellant and the victim, testified that she had heard the two parties "talking or arguing" previous to the date of the crime. She could not remember specifics of any argument and said that it was just "normal husband and wife" arguing (R 271,272,279,280). She never heard Appellant threaten the victim (R 280). This witnesses' husband, William Peterson, said he heard the victim hollering in the past, but had never heard any "particular fight" between her and Appellant (R 245-246). He also testified that when the victim and Appellant were together before she left for Jai Alai, they were not arguing or fighting (R 259). The third witness was Gloria Davis. She

said in the past each party argued and accused each other of "running around". These were "equal" arguments (R 293,300). She testified that on one or two prior occasions she "heard" one of the parties hitting the other. She does not know who hit whom (R 300-301). These discussions as to these prior difficulties are vague as to time and severity. If anything, they appear to be relatively minor domestic disputes. They certainly do not rise to the level of establishing premeditation.

The sixth factor listed above concerns prior statements of intent or threats. Following are several cases in which the Court used this factor in reaching its conclusion that premeditation existed.

Hill v. State, supra- The defendant made threats toward the victim on three occasions.

Spinkellink v. State, supra- The accused told his accomplice that he may hear a gunshot. He then entered a motel room where the victim was killed by a gun.

Phippen v. State, supra- The defendant had said beforehand that he would like to kill his parents, who later became his victims.

No evidence exists in the instant case to establish any verbal indication that Appellant intended to kill Mary Robinson. The only testimony of any verbal communication prior to the shooting was the testimony of

Ada Mae Robinson who said that while the victim was at her residence, Appellant called three times and after the calls the victim looked "sad" (R 229-231). Although no threats or statements of intent, the Appellant, on the night in question, told his friend Rosa Lee Jones that the victim would probably come home arguing, but he did not seem mad (R 315-316, 327-328). Ms. Jones also testified that when she took Appellant home he "mumbled" about the victim cleaning up and "I don't know whether it was with a boyfriend or what he mumbled" (R 318-322). She further said he appeared a "little upset", but she, by her own admission, was not paying much attention (R 322,332). Do these vague statements by these witnesses indicate that the Appellant was contemplating the killing of a human being? Certainly not. In fact the only evidence in this whole trial that Appellant, during the entire evening in question, harbored any evil thoughts, was this testimony of witness Jones that he was a "little upset". There was no further explanation of that and the witness was not really concerned with it. Can a man be convicted of first degree murder because he was a "little upset"? These facts are not nearly as strong as in the above-cited cases where they were found to indicate premeditation.

The final factor involves the defendant's actions after the crime, including the disposition of the body.

Examples of this are as follows:

Prince v. State, supra- The defendant removed the body from the place of the homicide and dumped it in a cemetery.

Spinkellink v. State, supra- The defendant fled after his act.

Tedder v. State, supra- The perpetrator abandoned the victim and prevented others from attending to the victim.

Welty v. State, supra- The accused set fire to the residence and body of the victim.

In this case there is an absence of the above type of action. In fact the Appellant's actions were the opposite. He did not flee. He immediately went next door and asked the neighbors to call the authorities (R 255-256, 276-277). Appellant yelled the name of the victim (R 255-256, 293-296). He showed concern by not wanting to leave the area of the victim when the paramedics were administering to her (R 355-356). Appellant obviously made no effort to escape or conceal his action. Not only does this show a lack of evidence of premeditation, it is affirmative evidence indicating that no premeditation existed.

This is clearly the act of one who suddenly inflicts a wound upon one without reflecting on it. Appellant was in the presence of no one and certainly had ample opportunity to attempt to flee or even do something with the body. Instead he sought help for her.

There is one other factor that must be considered even though it may not fit precisely within one of the seven enumerated factors. The Appellant borrowed the gun involved herein from his next door neighbor, William Peterson, on the evening of the crime; however, there is no evidence that he intended to use it on Mary Robinson. The Appellant indicated he needed the gun because he was going gambling (R 244-250,259). Appellant was not upset when the gun was lent, nor did he get upset even when he was with the victim (R 247-248,259-263). Mr. Peterson would not have loaned the gun to <sup>A</sup>Appellant if he suspected any trouble (R 259).

The important point is that if Appellant was planning to use a gun to kill Mary Robinson he would not have been so open and blatant about it. He certainly would not have borrowed the gun from his very next door neighbor. He certainly would not have come running immediately over to that same neighbor after the shooting.

Quite often this Court has reduced a homicide from first degree murder to one of lower degree. Jenkins v. State, 161 So. 840 (Fla.1935), Douglas v. State, 10 So.2d 731 (Fla.1942), Taylor v. State, 22 So.2d 639 (Fla.1945), Febre v. State, 30 So.2d 367 (Fla.1947), Timmons v. State, 57 So.2d 36 (Fla.1952), Sheffield v. State, 73 So.2d 65 (Fla.1954), Purkhiser v. State, 210 So.2d 448 (Fla.1968). See also, Weaver v. State, 220 So.2d 53 (Fla. 2nd DCA 1969) and



Hines v. State, 227 So.2d 334 (Fla. 1st DCA 1969).

The cases of Febre v. State, supra and Hines v. State, supra are not unlike the case at bar in that the court in each of those cases reduced the first degree murder conviction to one of a lesser degree even though the defendant in each of those cases gave testimony which would completely exonerate him of any criminal guilt. In other words they reviewed the facts independent of and disregarding the defendant's testimony.

Also, in Snipes v. State, 17 So.2d 93 (Fla.1944) the defendant there testified and denied that he fired the fatal shot. Nevertheless, the Court went on to find that sufficient testimony existed to find that he did fire the shot, but that premeditation was not shown. The majority in that case did not determine a conviction of a certain lesser degree, but remanded for the lower court to do so.

Appellant in the instant case asserts that a gap exists and there is no evidence showing any of the circumstances surrounding the actual homicide, i.e. the shooting and what occurred between Appellant and the deceased. This was the situation of Weaver v. State, supra. In that case a witness observed a police officer arrive at the defendant's house on a disturbance call. An argument began between the two which resulted in the defendant being sprayed with Mace. The witness viewed the two "wrassling". The next testimony is that of two other officers who arrived on the scene to hear the

original officer shout "No! No!". They then heard some shots and saw defendant holding a gun in the area of the body of the original officer. The original officer had been shot three times, twice in the back. The defendant said, "Yes, G\_\_\_ D\_\_\_ it, I killed him."

The court in Weaver held that because of the gap in circumstances, premeditation could not be established. They said at page 59 of their opinion

...nor do we know any of the circumstances which surrounded the parties at that time. Any other circumstantial evidence on this point, as it is, is susceptible of at least two inferences, thus probative of none.

Certainly, in the instant case a much greater gap existed than in the Weaver case.

In summary, it can be said that in the case at bar several matters harmful to Appellant exist. Those are basically the facts that Appellant borrowed the gun the evening of the shooting, he made a statement to the effect that he felt the deceased was washing up maybe from being with a boyfriend and that he was a "little upset", and that they had argued on prior occasions. The cumulative effect of all of the negative evidence is very weak and not nearly as strong as those found in the cases which determined premeditation from circumstantial evidence. In those cases there existed multiple wounds, actual threats,

lying in wait, hiding the body, fleeing, etc. For these reasons alone it would appear the finding of premeditation herein cannot be sustained. But the instant case goes even further in that not only are the harmful factors weak, there are a number of factors further casting doubt on premeditation. Only one shot was fired. There is no evidence of any argument or fight between the parties that evening. Appellant openly borrowed the gun. The witness testifying to the statement of Appellant about washing up and about being a little upset admitted to not really paying much attention to what he said. The prior arguments appeared not to be of a serious nature. Appellant did not flee, but remained and asked that the police be called and showed concern over the deceased. Also, the overall actions and demeanor of Appellant during the evening prior to the shooting do not indicate he was contemplating a killing. No evidence suggests that he was acting nervous. All evidence indicates normal behavior on the part of Appellant.

These factors coupled with the test of circumstantial evidence as summarized in the first degree murder case of McArthur v. State, 351 So.2d 972 (Fla.1977) clearly establish that insufficient evidence exists as to premeditation. That test as stated on page

976 of McArthur is:

Where the only proof of  
guilt is circumstantial, no  
matter how strongly the  
evidence may suggest guilt  
a conviction cannot be  
sustained unless the evidence  
is inconsistent with any  
reasonable hypothesis of  
innocence. (Emphasis added.)

## POINT II

### THE LOWER TRIBUNAL ERRED IN IMPOSING THE DEATH PENALTY.

This section of the brief will be divided into four parts. The first will deal with the application of the death penalty laws to the case at bar. The second part will urge that the lower tribunal erred by doubling aggravating circumstances. The third section will discuss the burden of proof of aggravating circumstances. The final portion concerns various other matters of a general nature.

After a jury recommendation, by 8 to 4, of death (R 843,1336), the lower court imposed the death penalty (R 855-861,1369-1374). In doing so, the court found two aggravating circumstances and no mitigating circumstances. The two aggravating circumstances found were that Appellant was under sentence of imprisonment, in that he was on parole, and that he had previously been convicted of a felony involving the "use of threat of violence to another", in that he had previously been convicted of two aggravated assaults (R 855-857 and 1369-1370).

#### A. Application of Death Penalty Laws

Even though an argument will be set forth in Point B below that the trial court erred in finding two aggravating circumstances, for the purposes of this section it will be assumed that the finding was proper. It is Appellant's

contention the overall view of this case coupled with the two aggravating circumstances as applied by the tests and criteria set out by this Court does not warrant the imposition of the death penalty.

As far as the actual murder itself, the single gunshot involved in this case is the least serious type of murder. No painful torture existed. No multiple wounding existed. No instrument causing slow death was involved. The victim did not linger for any lengthy period of time after the shot. No execution type of slaying happened. It is also submitted that the two aggravating circumstances which were proved are relatively minor compared to the others. It is interesting to note that seven of the nine statutory aggravating circumstances deal with the murder at hand, while two do not. §921.141(5), Fla.Stat. (1981). Appellant was found to have violated the two which do not pertain to the murder itself. Thus, the totality of all of the circumstances does not require the sentence of death.

A review of this Court's pronouncements about the application of the death penalty will establish that it is not an appropriate penalty in the case at bar. State v. Dixon, 283 So.2d 1 (Fla.1973) is the original case dealing with this matter. In that case the Court, on page 10, established:

It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and

Y numbers of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present..... If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.

This Court has recognized that it has the "responsibility to determine independently" if death is appropriate. Songer v. State, 322 So.2d 481, 484 (Fla.1975). See also Douglas v. State, 328 So.2d 18 (Fla.1976). As stated in Harvard v. State, 375 So.2d 833, 834 (Fla.1977) it is the duty of this Court to "evaluate anew" the circumstances.

A two part test was set forth in Brown v. Wainwright, 392 So.2d 1327 (Fla.1981). This Court's first function is to determine if the trial judge properly applied the procedures of §921.141. If the Court determines the lower court was correct, then a "proportionality" determination must be made. In other words, the Court must decide, as stated in Dixon, supra, how the case compares with other cases. The test of "proportionality" fails in the case at bar. The totality of the crime and aggravating circumstances do not require the ultimate penalty.

A sample of cases finding the death penalty appropriate will be helpful. These cases will be listed.

Hollman v. State, 305 So.2d 180 (Fla.1974)- The defendant slit the throat of a tavern employee with broken



glass and then robbed the tavern. The murder was done for pecuniary gain, it was especially heinous and defendant had a prior record.

Songer v. State, supra- Defendant killed an on duty police officer with a "fusillade" of shots. The accused was an escapee at the time of the murder and he had hindered a governmental function.

Meeks v. State, 336 So.2d 1142 (Fla.1976)- The victim was stabbed during the course of a robbery. Defendant had been previously convicted of a capital felony. The crime was done to prevent arrest, for pecuniary gain and hindered the enforcement of laws.

Hoy v. State, 353 So.2d 826 (Fla.1977)- The defendant participated in the rape of a teenage victim who was later shot. Another victim who attempted to help the rape victim was also shot. The murder was committed during the commission of a rape and was heinous.

Jackson v. State, 366 So.2d 752 (Fla.1978)- Defendant and a co-defendant robbed a couple in a parking lot and took them to a secluded area where the man was shot (but he survived) and the woman was shot and strangled and her body hidden. The murder was done during the course of a robbery, was done to eliminate the victim and was heinous.

Stone v. State, 378 So.2d 765 (Fla.1979)- The victim was apprehended on her way to her car by defendant, was taken by the defendant to another area, he struck her

several times with a hatchet, he mutilated the body, threw it into a river, cleaned up the blood and fled out of state. The finding was that defendant had previously been convicted of felonies involving violence and the murder was heinous.

King v. State, 390 So.2d 315 (Fla.1980)- The defendant escaped from a work release center, raped and killed his victim. She had numerous bruises over her body and two stab wounds. The defendant set her house on fire. The defendant then left and returned to the work release center where he stabbed (not fatally) 20 times a prison counselor. The aggravating circumstances were that the crime was committed while under sentence of imprisonment, he had been convicted of robbery and attempted murder, he created risk of death to other persons because of the fire, the murder was done during the course of a burglary and the murder was heinous.

Ruffin v. State, 397 So.2d 277 (Fla.1981)- The defendant and a companion abducted their pregnant victim, took her in her own car to a wooded area, raped her, pistol whipped her, robbed her, and shot her in the back of the head while she was lying face down. They then proceeded, in her car, to a convenience store which they robbed, which robbery resulted in a fatal shooting of a deputy. The aggravating circumstances were the previous conviction for the first degree murder of the deputy, the murder was committed in the

course of a robbery and kidnapping, the crime was heinous.

The above eight cases were selected at random, by the author of this brief, from a list of case names in which the death penalty was upheld. A review of these cases and all cases in which the death penalty was imposed will reveal that the totality of the circumstances are much more serious than those of the instant case. Hence, under the proportionality test the death penalty cannot stand.

This Court has reduced a death sentence to one of life imprisonment under circumstances seemingly more serious than those in the present case. For example, see the following cases, each of which contained a jury recommendation of life.

Tedder v. State, 322 So.2d 908 (Fla.1975)- In this case the defendant fired a shot at his wife, child and mother-in-law. They fled into a trailer and defendant pursued. While inside the defendant killed his mother-in-law with a gun. He then would not let his wife come to her aid. The lower court found three aggravating circumstances including that the crime was heinous. This Court found that it was not heinous. There were no mitigating circumstances.

Chambers v. State, 339 So.2d 204 (Fla.1976)- The defendant and victim had been living together. An argument arose which resulted in defendant beating her all over her head and legs. She died of cerebral and brain stem contusion. She was beaten so badly her face was unrecognizable. The

lower court found the crime to be heinous and found no mitigating circumstances. This Court found that the "totality of the circumstances" did not warrant the death sentence.

McCaskill v. State, 344 So.2d 1276 (Fla.1977)-

This is a robbery-murder with the murder coming from a shotgun blast from inside the get-away vehicle carrying three co-defendants. It is unknown who fired the blast. The trial court found that the crime created risk to a great number of people, and that it was committed during a robbery. This Court determined that a life sentence was appropriate, relying largely on comparisons with other similar cases.

Brown v. State, 367 So.2d 616 (Fla.1979)- The

defendant along with two others, abducted the victim for the purpose of stealing his car. They drove the victim to a lake, forced him into it, struck him with fists and boards and shot him. As they started to leave, the victim climbed out of the lake, so the three returned and a co-defendant held him underwater until he died. The trial judge found that the crime was heinous and was done during robbery and kidnapping. He found no mitigating factors, noting that defendant's age of 16 years was not a factor because of his maturity. Without rejecting the lower court's findings, this Court reversed based on "our precedents".

Phippen v. State, 389 So.2d 991 (Fla.1980)- The

defendant told someone that he was going to kill his mother

and stepfather, which he subsequently did with four shots to the former and six to the latter. The trial court found that the murder was done for pecuniary gain and that it was heinous. This Court found there was no proof of the pecuniary gain factor and held that the facts did not compel a death sentence.

Once again, applying the proportionality test, the instant case seems less aggravated than those cited above, thus, mandating a reduction of sentence to one of life imprisonment. It is interesting to note that three of the above cases (Tedder, Chambers, Phippen) involve domestic disputes, as does the case before the Court. It is even more interesting to note that on three occasions this Court has reduced to life sentences (as opposed to merely remanding for resentencing) cases in which the jury recommended death and each of those cases involved a domestic dispute. See Halliwell v. State, 323 So.2d 557 (Fla.1975), Kampff v. State, 371 So.2d 1007 (Fla.1979), and Blair v. State, 406 So.2d 1103 (Fla.1981). See also Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed. 2d 398 (1980). Thus, even greater reason exists that the death penalty herein should be reduced, based on the proportionality test.

At least on one occasion this Court has gone so far as to say:

...the trial court gave undue weight to the jury's recommendation of death and did not make an independent judgment whether or not the death penalty should be imposed.

Ross v. State, 386 So.2d 1191,1197 (Fla.1980). Perhaps that is the situation in the case at bar.

There are some matters in the instant case that could be said to be mitigating. Various witnesses testified that Appellant loves people and loves his family (R 784), he cares for people (R 786), he is nice (R 788), he takes care of his children (R 789), and he got along with fellow workers and was a good worker (R 791). The Appellant's father died when Appellant was six or seven years of age, when the family was living in Alabama. The Appellant's mother did not remarry and she raised the family the "best way I can". The Appellant helped in the raising of the family and quit school to help support them (R 792-794, 797-802). The Appellant's mother, son and sister testified that they do love him (R 794-799). The Appellant's son said his father was a good father and supported him (R 796).

These features were merely dismissed in an off hand fashion by the lower court without any explanation (R 859,1371). These types of factors can, however, be considered mitigating. Peek v. State, 395 So.2d 492 (Fla.1980) said that a defendant's character can be considered as a mitigating factor. Jacobs v. State, 396 So.2d 713,718 (Fla.1981) indicated that a valid mitigating factor was that the accused was "the mother of two children for whom she cared." That the defendant voluntarily surrendered can also

be a mitigating circumstance. Washington v. State, 362 So.2d 658 (Fla.1978). In the instant case the Appellant made no effort to flee and in fact had ample opportunity to do so because he was not arrested until three days after the incident (R 427-438,488,491,1072-1074).

B. Doubling of Circumstances

It is well settled that when one act constitutes a violation of two of the enumerated aggravating circumstances in §921.141(5), Fla.Stat. (1979), only one aggravation can be counted in the sentence determination process. Province v. State, 337 So.2d 783 (Fla.1976) and Armstrong v. State, 399 So.2d 953 (Fla.1981). Each of the Florida cases decided thus far deal with the circumstances of subsection (d) of the above statute (that the murder was committed in the course of another enumerated felony) and subsection (f) (that the crime was committed for pecuniary gain) or with subsections (e) and (g) (avoiding arrest and hindering law enforcement). See for example Province v. State, supra and Welty v. State, 402 So.2d 1159 (Fla.1981).

The same logic would certainly apply to any other subsections of the statute. In the instant case the trial court found that Appellant violated subsection (b) by having been convicted of two aggravated assaults in local case numbers 71-1551 and CR 74-3442. The court also found a violation of subsection (a) which also involved local case number CR 74-3442, albeit another count of that



same case (R 1369-1370, State's Exhibits 114 and 115).

For these reasons only one aggravating circumstance should have been found.

C. Burden of Proof of Aggravating Circumstances

It is clear that each aggravating circumstances must be proved beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla.1980). In the instant case, the only evidence offered to prove §921.141(5)(b), Fla.Stat. (1979) was the mere introduction into evidence the informations and judgments and sentences. No further explanation was given (R 779-782).

The question under subsection (b) is what constitutes a felony involving violence. This question is answered by Lewis v. State, 398 So.2d 432, 438 (Fla.1981) thusly:

This subsection refers to  
life threatening crimes in  
which the perpetrator comes in  
direct contact with a human  
victim.

The Appellant in each case was charged with assault with intent to commit a capital felony (a crime which no longer exists in Florida). In each case Appellant was not convicted of the charged crime, but of the lesser crime of aggravated assault (State's Exhibits 114 and 115).

It cannot be said, without further evidence, that Appellee proved beyond a reasonable doubt that Appellant had previously been convicted of the life threatening crimes required by Lewis. The necessary proof is just not present.

It should be noted that these exhibits were admitted

into evidence over Appellant's objections (R 765,769, 777,780-781,1247-1248).

Out of the numerous cases discussing subsection (b), the author could only find one case in which aggravated assault was listed as an aggravating circumstance. Henry v. State, 328 So.2d 430 (Fla.1976). In Henry the argument put forth herein was not discussed and a number of other aggravating circumstances existed.

One other comment must be made concerning the lower tribunal's Findings of Fact and Sentencing Order. On the second page of that document, when discussing this aggravating factor of subsection (b), the court said that in both of the prior cases Appellant had shot his victims (R 1370). There is absolutely no proof of that. The only indication of that was contained in the informations, but the Appellant was not convicted of that which was charged in either information. Bare allegations in documents which are over seven years old cannot rise to the level of proof.

#### D. Miscellaneous

The lower court erred in failing to declare unconstitutional the death penalty statute of Florida (§921.141, Fla.Stat.(1979)) as requested in Appellant's Motion to Declare Florida Statute Section 921.141 Unconstitutional, with authority cited therein (R 1229-1234). The lower court's denial of said motion is found at R 750-751.

The lower court also found that this felony was committed by a person under sentence of imprisonment. The judge based this finding on the fact that Appellant was on parole at the time of this offense (R 1369). This aggravating factor was designed primarily to punish prison murders, as the death penalty is the only additional punishment which could be imposed upon a person in prison. This Court has at least impliedly recognized that this circumstance should be limited to persons actually in prison. In the case of Ford v. State, 374 So.2d 496 (Fla.1979), the defendant was on probation and this Court rejected the trial judge's finding that he was under sentence of imprisonment. This rationale applies equally to a person on parole. There is however, authority to the contrary as cited in the lower court's ruling (R 1369).

A review of the cases since the current Florida death penalty law was enacted and upheld will reveal that the aggravating circumstances are much more likely to be found than the mitigating circumstances. In other words, the statute is heavily weighted toward a finding that the death penalty should be imposed. Although the statute on its face has been upheld, it can now be seen that it is unconstitutional as applied.

POINT III

THE LOWER TRIBUNAL ERRED IN ALLOWING  
INTO EVIDENCE MANY GRUESOME  
PHOTOGRAPHS.

During the testimony of Randolph Joslyn, 48  
photographs were admitted into evidence as State's Exhibits  
11 through 58 (R 374-375). These were admitted into evidence  
over objection of Appellant (R 374). A viewing of these pictures  
will reveal that in virtually every one some blood is shown  
and often in large amounts. These photographs were of the  
interior of the apartment where the shooting occurred (R 365-375).

No effort was made by the trial judge or the prosecutor  
for Appellee to attempt to limit the number of these gruesome  
pictures. A view of the photographs reveals that many are  
only slightly different views of the same thing. In fact,  
the photographer during his testimony acknowledged on numerous  
occasions that various photographs often showed the same matters  
(R 378,379,380,382,384,389,390,394).

The obvious intent of the prosecutor for the  
Appellee was to inflame and prejudice the jury by overemphasizing  
the blood. For example, he made these remarks during his  
opening and closing statements:

...it severed her carotid artery  
causing an awful amount of blood  
to be discharged. (R 216).

...her heart was still pumping.  
It was pumping the blood out  
of one side at a tremendous  
volume. You will see photographs  
as to how it spilled out on the  
wall. You can see every heart-  
beat of Mary Robinson.' (R 217).

...you can see each pump  
of the blood when she moves.  
You can see each pump of the  
heartbeat as the blood comes  
out of her neck. (R 218).

She was bleeding so fast  
that it caused a pool of  
blood...By now, the bleeding  
is beginning to slow down  
because she is running out of  
blood. (R 219).

The blood really exited at  
a great rate. (R 220).

You can see the arterial  
bleeding with the large  
volumes of blood here. It  
shows it splashing on the  
wall and running down as  
the blood was coming out.  
The blood was also running  
down her side and running  
down on her. (R 709).

...and blood is gushing  
out...(R 710).

As indicated by the case of Bauldree v. State, 284 So.2d  
196 (Fla.1973), this Court has established a relevancy  
test for photographs which may be gruesome. In other words,  
it matters not whether the photographs are gruesome, they  
are admissible if they are relevant; however, part of the  
relevancy test is whether the pictures are cumulative. As  
stated in the leading case of State v. Wright, 265 So.2d 361;  
362 (Fla.1972):

...the issues of "whether  
cumulative", or "whether  
photographed away from the  
scene", are routine issues  
basic to a determination of  
relevancy...

The courts have often discussed the necessity of limiting offensive photographs. Perhaps the leading modern case in the area of gruesome photographs is Young v. State, 234 So.2d 341 (Fla.1970). There the Court said on page 347:

...the admission of such photographs, particularly in large numbers must have some relevancy...

In discussing the pictures in that case, they went on to say at page 348:

The very number of photographs...cannot but have had an inflammatory influence on the normal fact-finding process of the jury. The number of inflammatory photographs and resulting effect thereof was totally unnecessary to a full and complete presentation of the state's case.

That is just the point in the instant case. The total number (48) of photographs presented was unnecessary, and coupled with the prosecutor's persistent reference to the blood depicted therein, cannot but have had an inflammatory and prejudicial influence on the jury.

As stated in Henninger v. State, 251 So.2d 862 (Fla.1971), relevancy is the test, but "necessity" becomes a consideration where large numbers of cumulative photographs of an inflammatory nature are involved. Also, the least gruesome photographs should be chosen when several depict the same thing. Gould v. State, 312 So.2d 225 (Fla. 1st DCA 1975).

In upholding the admission of offensive photographs, the courts often note that the trial court limited the number allowed into evidence. Alford v. State, 307 So.2d 433 (Fla.1975), Manes v. State, 262 So.2d 716 (Fla. 3d DCA 1972) and Cavero v. State, 349 So.2d 649 (Fla. 3d DCA 1977). This, of course, did not occur in the case at bar.

In his concurring opinion in Funches v. State, 341 So.2d 762 (Fla.1977), Justice England, while disclosing gruesome photographs said at page 765:

I echo an earlier suggestion from this Court, however, that prosecutors in this state should be more circumspect in their endeavors and should remove from the courtrooms of this state, to the fullest extent possible, the elements of passion and emotion. We must all strive for a system in which juries convict alleged criminals solely on the basis of proof, without resort to the horror of particular crimes.

The prosecutor in the case at bar made no effort to follow this admonition, but obviously did the opposite in attempting to introduce passion. In our society blood raises the emotions to the highest of levels and the prosecutor made every effort to use that effect.

In Jackson v. State, 359 So.2d 1190,1192,1193 (Fla.1978), this Court warned:

However, we again caution the prosecutors of this state that gory and gruesome photographs



admitted primarily to inflame  
the jury will result in a  
reversal of the conviction.

The instant case is one in which this caution should be fulfilled.

For the above reasons, Appellant contends that while some of the photographs in question were relevant and admissible, the total number of them were not, and they served only to inflame the jury. It may be argued that the photographs are not gruesome, that they do not depict a body. In the current case, however, the prosecutor's concerted efforts to link the photographs with an image of the victim severely bleeding and dying paints an extremely gory and prejudicial picture.

It should be noted that a so-called bloodstain splatter analyst testified. In her testimony she relied almost exclusively on her own slides (as opposed to the prints in question here) taken of the scene (R 526-578). The photographs in question were not used.

One can't help but to think that these photographs, coupled with the prosecutor's graphic remarks, caused the jury to find premeditation and to recommend the death penalty, when otherwise they would not have done so.

#### POINT IV

THE LOWER TRIBUNAL ERRED IN REFUSING TO INSTRUCT THE JURY ON CIRCUMSTANTIAL EVIDENCE.

Appellant requested the trial court to instruct the jury on circumstantial evidence. This request was denied and Appellant's counsel voiced his objections thereto (R 669-670). As trial counsel pointed out, this is a "classic" case of circumstantial evidence. As to the key element of premeditation (as discussed in Point I of this brief), only circumstantial evidence exists in the case at bar. No direct evidence exists.

The well established rule is that it is reversible error to refuse to give a circumstantial evidence instruction in a case in which the prosecution relies solely on circumstantial evidence to prove an essential element. Leavine v. State, 147 So. 897 (Fla.1933), McCall v. State, 156 So. 325 (Fla.1934), Newsome v. State, 355 So.2d 483 (Fla. 2d DCA 1978), Lee v. State, 362 So.2d 693 (Fla. 4th DCA 1978) and Perez v. State, 371 So.2d 714 (Fla. 2nd DCA 1979).

There can be no question but that in the instant case premeditation was a key element. Since no felony-murder theory existed, premeditation is the only difference between first-degree murder and some lessor degree of homicide as discussed in Point I herein.

Perez, supra dealt precisely with this point. The court stated on page 717 of that opinion:

While there is no question but that premeditation may be established by circumstantial evidence, [citations omitted], an instruction on circumstantial evidence is required where the prosecution relies solely or substantially on circumstantial evidence to prove an essential element of the offense charged.

It is true as suggested below (R 669-670) that the Florida Standard Jury Instructions in Criminal Cases, 1981 Edition, omit circumstantial evidence; however, as stated by this Court in its order and opinion adopting the Instructions (Case Numbers 57,734 and 58,799, filed April 16, 1981):

...the Court recognizes that no approval of these instructions by the Court could relieve the trial Judge of his responsibility under the law to charge the jury properly and correctly in each case as it comes before him. This order is not to be construed as any intrusion on that responsibility of the trial judges.

Thus, this Court stated that the standard instructions are guidelines and are not precise and unflexible as are rules and case law promulgated by this Court. If ever there existed a situation in which the standard instructions should be expanded, it is the current situation that involves the proof of the key element (premeditation) in the most serious type of crime recognized by this State.

The trial judge did not exercise his "responsibility" to determine the law and, therefore, committed reversible error in failing to give the requested instruction as required by the above-cited law.

## POINT V

### THE LOWER TRIBUNAL ERRED IN ALLOWING JUDY BUNKER TO TESTIFY AS AN EXPERT WITNESS

The trial court, over objection from Appellant, allowed witness Judy Bunker to testify as an expert in the area of "bloodstain splatter analysis" (R 532-533). The lower court should not have allowed her to testify for two reasons. The first is that her supposed area of expertise is not one which has attained the degree of scientific acceptability necessary to be allowed in a court of law. The second reason is that she has insufficient knowledge, skill, experience, training or education to allow her qualification as an expert.

There was virtually no testimony as to the acceptability of this field in the scientific community. In fact, the only testimony concerning the history of this area came on Appellant's voir dire of this witness. She testified that a Professor MacDonald established an "institute" in 1969 and published articles in 1970. The only course available is a 5 day course taught by Professor MacDonald or his associates (R 531-532). Ms. Bunker's formal training consisted of that 5 day institute in 1974 (R 531). She testified that she "worked with Professor MacDonald quite a long time." Upon further voir dire by Appellant, she said that by this she meant that she went to New York one time to see the professor, met him one time in Ft. Lauderdale and talked on the phone with him many times (R 531-532).

It is clear that scientific evidence must be such that it is recognized and accepted by the scientific community. Coppolino v. State, 223 So.2d 68 (Fla. 2nd DCA 1968) and Worley v. State, 263 So.2d 613 (Fla. 4th DCA 1972). In Worley, the court held that evidence of voiceprints was admissible because "impressive scientific data has been amassed as to the voiceprint's reliability." (Page 614 of the opinion).

In the instant case there is absolutely no evidence of the scientific community's acceptance of "bloodstain splatter analysis". On the contrary the witness herself establishes that the field is quite young and very limited. For this reason alone her testimony and opinions set forth therein were improper.

A codification of the case law exists in §90.702, Fla.Stat. (1979). That section establishes that a person may be qualified to testify as an expert witness based on knowledge, skill, experience, training, or education. These factors have not been established in the instant case for the reasons discussed above.

POINT VI

Stein v. State  
Dunn v. State

THE LOWER TRIBUNAL ERRED IN EXCUSING FOR CAUSE TWO PROSPECTIVE JURORS AND IN DENYING APPELLANT'S MOTION TO PRECLUDE CHALLENGE FOR CAUSE.

The trial court excused for cause two prospective jurors, Valerie Francisco and Karen Hampton, based upon their objections to the death penalty. These excuses were made over objection of Appellant (R 198-205). Neither of these excuses were proper under the tests of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776 (1968), and the Florida cases following Witherspoon (See, for example, Brown v. State, 381 So.2d 690 (Fla.1980) and King v. State, 390 So.2d 315 (Fla.1980).)

Those cases establish a two part test. First, a venireman should be excused if his feelings about the death penalty would prevent him from making an impartial decision during the guilt-innocence phase of the trial. Second, a prospective juror should also be excused if they would under no circumstances vote for a recommendation of death during the penalty phase.

Although both prospective jurors in the instant case expressed strong feelings against the death penalty, neither met these tests for excuse.

The record reflects the following statements concerning prospective juror Valerie Francisco:

MR. COMBS: Ms. Francisco, is your opposition to the death penalty to the extent that it would influence your vote whether or not it would be first degree murder or second degree murder or not guilty?

PROSPECTIVE JUROR FRANCISCO: Yes, it would.

MR. COMBS: Do you feel then that if you were sitting in the jury room, and you thought, well, the state has proven the case of first degree murder, but because the death penalty is a possibility, I am not going to vote for first degree murder? Would that be how your thinking would be?

PROSPECTIVE JUROR FRANCISCO: Yes, it would.

MR. COMBS: If you were selected as a juror, and you also voted for first degree murder verdict, would you automatically vote against the death penalty no matter what the state presented in aggravation?

PROSPECTIVE JUROR FRANCISCO: Yes, I would. (R 14-15).

But then her position became not quite so hard:

MR. COMBS: Your answer on the death penalty would be basically that you would automatically vote against the death penalty, and you would not be able to return a verdict of murder in the first degree?

PROSPECTIVE JUROR FRANCISCO: It would be hard.

MR. COMBS: Okay. Would you feel that you would automatically vote against the death penalty if you were a member of the jury and the verdict was for murder in the first degree?



PROSPECTIVE JUROR FRANCISCO: No.  
I am not for it.

MR. COMBS: Well, you would automatically  
vote against it; is that correct?

PROSPECTIVE JUROR FRANCISCO: I  
believe I would. (R 42-43).

MR. JONES: Let me ask the two of  
those a few questions. Ms. Francisco,  
do you believe that it would be a  
real problem with you in deciding  
the first phase?

PROSPECTIVE JUROR FRANCISCO: Well, the  
evidence would have to be overwhelming.

MR. JONES: The judge will instruct  
you that you are not to consider the  
penalty until after the verdict is  
reached. You don't think you  
would be able to separate that  
second phase?

PROSPECTIVE JUROR FRANCISCO: I am  
not sure.

MR. JONES: I know it is a  
difficult question.

PROSPECTIVE JUROR FRANCISCO: I  
think I could, but I couldn't  
recommend the death penalty after-  
wards.

MR. JONES: Under any circumstances  
where you couldn't recommend the  
death penalty, you don't think it  
would affect your deliberations in  
the first phase?

PROSPECTIVE JUROR FRANCISCO: I  
would try not to let it. (R 139-140).

MR. JONES: Okay. Back to you, Ms.  
Francisco, do you think you could  
follow the law and make the guilt  
or innocence decision if it came  
down to that?

PROSPECTIVE JUROR FRANCISCO: Well,  
yes. (R 140-142).

The record of the discussions with Karen Hampton are as follows:

MR. COMBS: ...do you think that your opposition to the death penalty would influence your decision as to what degree of murder he might be guilty on, whether you return a verdict of guilty at all, because you might have this opposition?

PROSPECTIVE JUROR HAMPTON: Yes, I do.

MR. COMBS: And if you were selected and a first degree verdict was returned, would you automatically vote against the death penalty regardless of what the statutory aggravating circumstances or mitigating circumstances are?

PROSPECTIVE JUROR HAMPTON: Yes, I would.

MR. COMBS: Your opposition is such that you would have difficulty following the law in this case. Would that be fair to say?

PROSPECTIVE JUROR HAMPTON: Yes, it is fair.

MR. COMBS: It would be fair to say that it would be impossible for you to follow the law?

PROSPECTIVE JUROR HAMPTON: Very difficult. (R 13-14).

MR. COMBS: I assume because of your feelings on the death penalty, that you would vote against it if you were selected?

PROSPECTIVE JUROR HAMPTON: Yes.

MR. JONES: Ms. Hampton, do you think part two would cause you any problem in performing your duty in part one?

PROSPECTIVE JUROR HAMPTON: Yes, I think it would hinder my concentration. I think I would be obsessed with the idea that I might have to make that decision, and I might not be able to be impartial.

MR. JONES: You don't think you would be able to perform your duty according to the law and the instructions the judge will give you as to part one because you would be so concerned about part two or the possibility of part two?

PROSPECTIVE JUROR HAMPTON: That is correct. (R 140).

As to Ms. Francisco she started with a fairly strong position but softened as the questioning continued. She said "It would be hard" to find a verdict of first degree (R 42). When she was asked if she would automatically vote against a recommendation of death, she only said, "I believe I would." (R 43). Finally, as to the guilt phase of the trial she said she would "try not to let" her opposition to the death penalty influence her decision (R 140). It can be seen that, although this prospective juror had strong feelings against capital punishment, she did not meet the tests for excuse under the above cited cases.

Venirewoman Hampton said that it would be "very difficult" to follow the law (R 14) and that her opposition to the death penalty would "hinder my concentration." (R 140).

For these reasons it was error for the lower tribunal to excuse for cause venirewomen Francisco and Hampton because of their opposition to the death penalty. This is especially so as to Ms. Francisco. Neither said that their feelings

would prevent them from returning a verdict of murder as charged. It was not established that either one would under all circumstances vote against a recommendation of death.

For the same reasons and for the reasons cited therein, the lower court erred in denying Appellant's Motion to Preclude Challenge for Cause (R 748-749, 1243-1244).

POINT VII

THE LOWER TRIBUNAL ERRED IN FAILING TO GRANT A MISTRIAL OR TO INSTRUCT THE JURY TO DISREGARD COMMENTS ON APPELLANT'S RIGHT TO REMAIN SILENT.

During his testimony Arthur Wilson, a police officer, stated that in questioning him, Appellant "didn't want to talk to us any more." (R 438). Also, during closing arguments, the prosecutor said Appellant "did not present any explanation to anything." (R 702).

These are clearly improper comments on the right of Appellant to remain silent under the Fifth Amendment, Constitution of the United States. Such comments are reversible without regard to the harmless error doctrine. See Bennett v. State, 316 So.2d 41 (Fla.1975).

Appellant's trial counsel did not object to these comments, nor did he move for a mistrial. This Court has held that such objections or motions are necessary. Clark v. State, 363 So.2d 331 (Fla.1978). Appellant asks the Court to recede from this position, because such comments are constitutional violations of a fundamental nature.

POINT VIII

THE LOWER TRIBUNAL ERRED IN ADMITTING  
INTO EVIDENCE A PIECE OF LINOLEUM.

The lower court admitted into evidence, over Appellant's objection, a piece of linoleum removed from the scene of the shooting (R 596-597). This item had a large amount of blood on it and was, therefore, gruesome. This item was only cumulative of other testimony and photographs admitted into evidence and was not necessary. The same arguments and citations as set out in Point III of this brief would apply to this point; therefore, it was error to admit it.

POINT IX

THE LOWER TRIBUNAL ERRED IN DENYING  
APPELLANT'S MOTION TO DECLARE SECTION  
922.10 FLORIDA STATUTES UNCONSTITUTIONAL.

The trial court denied Appellant's Motion to  
Declare Section 922.10 Florida Statutes Unconstitutional  
(R 749-750, 1240-1242). Without further argument herein,  
Appellant would rely on the arguments and authority cited  
in said motion, and urge that it was error to deny said motion.



POINT X

THE LOWER TRIBUNAL ERRED IN DENYING  
APPELLANT'S MOTION TO DISMISS GRAND  
JURY INDICTMENT.

Appellant filed in the trial court his Motion to Dismiss Grand Jury Indictment containing an argument based on the number of grand jury members (R 1278-1279). The court below denied said motion (R 1280). Appellant relies on the argument and authority presented in that Motion.

POINT XI

THE LOWER TRIBUNAL ERRED IN ADMITTING INTO EVIDENCE VARIOUS PHOTOGRAPHS DURING THE TESTIMONY OF JUDY BUNKER AND THOMAS HEGERT.

During the testimony of Thomas Hegert (the medical examiner) and Judy Bunker, a number of photographs were admitted without objection from Appellant's trial counsel (R 509,512,534). The photographs admitted during Dr. Hegert's testimony were State's Exhibits 90-99. The photographs admitted by Ms. Bunker consisted of 77 slides admitted as composite Exhibit 101.

As can be seen from the testimony of the witnesses these photographs depicted the victim in the morgue and blood at the scene of the shooting (R 514-519, 534-569). These photographs were gruesome and it was error to admit them for the reasons stated in Point III of this brief.

## POINT XII

THE LOWER TRIBUNAL ERRED IN ADMITTING INTO EVIDENCE A LARGE NUMBER OF ITEMS AND MATTERS WHICH WERE NOT OBJECTED TO BY TRIAL COUNSEL.

The following items and matters were admitted into evidence without objection from Appellant's trial counsel:

1. A statement from Appellant as relayed to witness Cheryl Felski (R 348-349).
2. A taped statement made by Appellant and witness Arthur Wilson's comments about statements made by Appellant (R 418-439, State's Exhibits 59,60,61,62).
3. Various clothing items, items from the scene of the shooting, and photographs of clothing and items from the scene admitted during the testimony of Edward Mullis (R 454-475, State's Exhibits 71 through 88).
4. A statement given by Appellant to Edward Mullis (R 488).
5. Bloody clothing items of the victim admitted during the testimony of Dr. Thomas Hegert (R 513-514, State's Exhibit 100).
6. Shoes, photographs of linoleum, shoe impressions in blood admitted during the testimony of Terrell W. King (R 595-608), State's Exhibits 105, 106 through 112).
7. A bullet admitted during the testimony of Gary Rathman (R 621, State's Exhibit 113).

It was error for the lower court to admit these items and matters into evidence.

CONCLUSION

For the reasons stated in this brief, Appellant respectfully requests this Honorable Court to reverse and vacate the Judgment and the Sentence of the lower tribunal, or in the alternative to reverse the Judgment and the Sentence and to remand to the lower tribunal .

Respectfully submitted,

CHARLES A. TABSCOTT, ESQUIRE  
46 Park Lake Street  
Orlando, Florida 32803  
(305) 841-6739

CHARLES A. TABSCOTT, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida, this the \_\_\_\_\_ day of May, 1982.

\_\_\_\_\_  
Of Counsel

STATE OF FLORIDA

-vs-

INDICTMENT NO. CR80-5117

FREDDIE LEE WILLIAMS

DIVISION 11

MOTION TO DECLARE FLORIDA STATUTE  
SECTION 921.141 UNCONSTITUTIONAL

THE ACCUSED, by and through his undersigned counsel moves this Court to declare Florida Statutes §921.141 unconstitutional. As grounds in support thereof the Accused alleged the following:

1. Florida Statutes §921.141 is unconstitutional on its face in that it is violative of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article Section 9 and 17 of the Constitution of the State of Florida.

In support of this allegation the Accused would state

A) The aggravating and mitigating circumstances as enumerated in Florida Statute §921.141 are impermissibly vague and overbroad.

The first aggravating circumstance listed is that the capital felony was committed by a person under sentence of imprisonment. This circumstance is overbroad in that it makes no distinction between a person imprisoned for a non-violent crime and one imprisoned for a violent crime.

Aggravating circumstance (b) relating to the previous conviction of another capital felony or a felony involving the use or threat of violence also suffers from overbreadth in that the circumstances surrounding the prior felony are not considered.

Aggravating circumstance (c) involving the knowing creation of a great risk to many persons is irrefutably vague simply due to its qualifying adjectives. Furthermore, although the intent of the Legislature was to direct this circumstance

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toward hijacking and bombings, this circumstance has been applied so broadly as to encompass almost any murder.

Aggravating circumstance (d) involves felony murder. This particular circumstance is factually overbroad in that a capital felony committed during the enumerated felonies has an automatic aggravating circumstance and, therefore, carries with it a presumption of death without regard to the individual facts surrounding each case. Consideration of this aggravating circumstance could lead to a sentence of death which is totally disproportionate to the defendant's conduct. "A punishment is excessive and unconstitutional if it is grossly out of proportion to the severity of the crime." Coker v. Georgia, 97 S. Ct. 2861 (1977). Pursuant to this circumstance a "wheelman", whose co-defendant accidentally kills someone during the commission of an enumerated felony would presumptively and automatically be considered for a death sentence, while a cold-blooded pre-meditated murder could conceivably be exempt from any aggravating circumstance. The arbitrariness of this circumstance is then evident.

Aggravating circumstances (e) and (g) are vague and overbroad as to render consistent application impossible. Aggravating circumstance (e) relates to a capital felony committed to avoid lawful arrest or to effectuate an escape from custody and circumstance (g) involves the disruption of the lawful exercise of any governmental function or the enforcement of laws. Examination of recent cases reveal that the silencing of a witness has been considered as giving rise to aggravating circumstances (e) and (g), Meeks v. State, 336 So. 2d 1142 (Fla. 1976), as giving rise only to circumstance, Gibson v. State, 351 So. 2d 948 (Fla. 1977).

Aggravating circumstance (h) applies where the capital felony is especially cruel, heinous or atrocious. Almost any capital felony would appear especially cruel, heinous and atrocious to the layman, particularly any felony murder. Examination of the widespread application of this circumstance

indicates that reasonable and consistent applications is impossible.

The mitigating circumstances enumerated in the statute are vague and overbroad as well. The qualifying adjectives used to describe the circumstance unconstitutionally limit the mitigating factors to be considered and foster an arbitrary application.

B) Florida Statute §921.141 is also unconstitutional on its face in that it is violative of the mandate of the United States Supreme Court as expressed in Locket v. Ohio, 438 U.S. 586 (1978), 98 S.Ct. 2964 (1978), which requires that the defendant be allowed to present all evidence relevant to the mitigation of sentence.

Florida Statute §921.141 expressly limits applicable mitigating circumstances to those enumerated in sub section (6). Sub section (6) expressly states "mitigating circumstances shall be the following" (emphasis added). Sub section (2) states "that the jury shall deliberate and render an advisory sentence to the court based on . . . (B) Whether sufficient mitigating circumstances exist as enumerated in sub section (6) which outweigh the aggravating circumstances found to exist. (emphasis added).

Examination of the legislative history of §921.141 clearly shows that the intent of the legislature was to limit both aggravating and mitigating circumstances so as to avoid the purely discretionary and arbitrary sentencing standards condemned in Furman v. Georgia, 408 U.S. 238 (1972).

Just prior to Furman, the legislature has passed a new capital sentencing law permitting consideration of mitigating circumstances "including but not limited to" a list of factors enumerated in the statute. Laws of Florida, Chapter 72-72 (1972). The statute took effect on October 1, 1972, but was short-lived as a result of Furman. The legislature determined that unguided discretion was precluded in the aftermath of Furman and therefore abandoned Chapter 72-72 in favor of the present Florida Statute §921.141.



Pursuant to the obvious intent of the legislature and the plain language of the statute, the Florida Supreme Court held in Cooper v. State, 336 So. 2d 133 (Fla. 1976):

The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal. Such evidence threatens the proceeding with the undisciplined discretion condemned in Furman v. Georgia, 408 U. S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972).

The legislative intent to avoid condemned arbitrariness pervades the statute. Section 921.141(2) requires the jury to render its advisory sentence "upon the following matters: (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6): in subsection (7), which outweigh the aggravating circumstances found to exist . . ." (emphasis added). This limitation is repeated in Section 921.141(3), governing the trial court's decision on the penalty. Both sections 921.141(6) and 921.141(7) begin with words of mandatory limitation. This may appear to be narrowly harsh, but under Furman undisciplined discretion is abhorrent whether operating for or against the death penalty.

The Court went on to say, "In any event the legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty for the most aggravated and unmitigated of serious crimes, and we are not free to expand the list. Cooper v. State, supra at 1139 (emphasis added).

The Supreme Court of Florida, in response to Locket v. Ohio, supra, attempted to retreat from the unqualified pronouncement expressed in Cooper. In Songer v. State, So.2d (Fla. 1979), Fla. S.Ct. No. 52,642 the Supreme Court said that in Cooper it was concerned, not with whether evidence proffered in mitigation came within the enumerated mitigating factors, but rather with whether the proffered evidence was probative. The

above excerpt from Cooper belies this position. Furthermore, whatever Songer means by "probative", any such qualifying limitation upon the presentment of evidence in mitigation conflicts with the mandate of the United States Supreme Court as expressed in Locket and renders §921.141 unconstitutional.

C) Florida Statute 921.141 is unconstitutional on its face in that the State of Florida is unable to justify the death penalty as the least restrictive means available to further a compelling state interest, as is required by Roe v. Wade, 410 U. S. 113 (1973) where a fundamental right, such as life, is involved. A mere theoretical justification will not satisfy the requisite burden of proof incumbent upon the state.

II. Florida State §921.141 is unconstitutional as applied and, therefore, violates the Eighth and Fourteenth Amendments to the United State Constitution and Article I & 9 & 17 of the Florida Constitution. In support of this allegation the Accused would state:

The sentencing patterns of juries and judges under the 1972 Florida Statute have in fact exhibited a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman v. Georgia, 408 U. S. 238 (1972). Death sentences in Florida are imposed irregularly, unpredictably and whimsically in cases which are no more deserving of capital punishment, under any rational standard that considers the character of the offender and the offense, than many other cases in which sentences of imprisonment are imposed. Inconsistent and arbitrary jury attitudes and sentencing verdicts, uneven and inconsistent prosecutorial practices in seeking or not seeking the death penalty, divergent sentencing policies of trial judges and erratic appellate review by the Supreme Court of Florida all contribute to produce an irregular and freakish pattern of life or death sentencing results.

III. The facts and circumstances surrounding the offense in this cause demonstrate that the application of the death penalty in this cause would be disproportionate to the severity of the crimes alleged and further, would deprive the Accused of equal protection of the law.

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was delivered to the Office of the State Attorney, 250 N. Orange Avenue, Orlando, Florida, this the 9th day of July, 1981.

JOSEPH W. DuROCHER  
PUBLIC DEFENDER

By: 

GERALD W. JONES, JR.  
Assistant Public Defender  
250 N. Orange Avenue  
Suite 900  
Orlando, Florida 32801

STATE OF FLORIDA

-vs-

INDICTMENT NO. CR80-5117

FREDDIE LEE WILLIAMS

DIVISION 11

MOTION TO DECLARE SECTION 922.10  
FLORIDA STATUTES UNCONSTITUTIONAL

THE ACCUSED, by and through his undersigned attorney,  
moves this Honorable Court to declare Section 922.10 Florida  
Statutes, (1979) unconstitutional as violative of the Eighth  
and Fourteenth Amendments to the United States Constitution  
and Article I, Sections 9 and 17, of the Florida Constitution,  
and requests an evidentiary hearing upon the Motion. The Accused  
asserts the following grounds in support of this Motion:

1. The Accused is charged with a violation of Section  
782.04 (1) (a) Florida Statutes (1979). First Degree Murder,  
capital felony.
2. A conviction of a capital felony requires the Court  
to impose a sentence of Life imprisonment, or death. Section  
775.082, Florida Statutes (1979).
3. To determine the appropriate sentence upon conviction  
of a defendant for a capital felony, the Court must follow  
the procedure set forth in Section 941.141, Florida Statutes  
(1979), in order to determine sentence of death or life  
imprisonment.
4. Should the Court determine that a sentence of death  
is appropriate such sentence must be imposed by means of  
electrocution pursuant to Section 922.10 Florida Statutes (1979).
5. Death by electrocution, in the "electric chair", is  
cruel or unusual punishment" in violation of Article I,  
Section 9 and 17 of the Florida Constitution.
6. Death by electrocution, in the "electric chair", is  
"cruel or unusual punishment" in violation of Article I, Section  
9 and 17 of the Florida Constitution.
7. "A penalty.....must accord with "the dignity of man",  
which is the basic concept underlying the Eighth Amendment"

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Trop v. Dulles, 356 U.S. at 100, 78 S. Ct. at 597 (plurality opinion). This means at least, that the punishment not be 'excessive'. When a form of punishment in the abstract. . . rather than in the particular. . . is under consideration, the inquiry into 'excessiveness' has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. Furman v. Georgia, 408 U.S. at 392-393, 92 S.Ct. at 2805-2806. . . Second, the punishment must not be grossly and out of proportion to the severity of the crime." Gregg v. Georgia, 96 S.Ct. 2909, at 2925, (1976).

8. "We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved." Gregg v. Georgia, 96 S.Ct. 2909 at 2926, (1976).

9. The American draftsmen who adopted the Eighth phrasing in drafting the Eighth Amendment, were primarily concerned with, proscribing "tortures" and other "barbarous" methods of punishment. However, the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. Gregg v. Georgia, 96 S.Ct. 2909, at 2923-2925, (1976).

10. Death by electrocution in the electric chair involves the unnecessary and wanton infliction of pain.

11. Death by electrocution in the electric chair is cruelly inhumane and does not meet the evolving standards of decency that mark the progress of our maturing society;

THE ACCUSED specifically requests the opportunity to present evidence at an evidentiary hearing before the Honorable Court wherein the Accused will prove the above-stated allegations.

WHEREFORE, the Accused prays this Honorable Court to grant his Motion after due consideration of the evidence to be adduced at the evidentiary hearing.

I HEREBY CERTIFY that a true and correct copy of  
the foregoing has been delivered to the Office of the State  
Attorney, 250 N. Orange Avenue, Orlando, Florida, this the  
9<sup>th</sup> day of July, 1981.

JOSEPH W. DUROCHER  
PUBLIC DEFENDER

By: 

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CASE NO. CR80-5117

STATE OF FLORIDA

VS.

FREDDIE LEE WILLIAMS

FILED IN OPEN COURT

THIS 18 DAY OF Dec, 1981

W. D. Gorman, Clerk

BY B. B. Hightower D.C.

FINDINGS OF FACT AND SENTENCING ORDER

In a jury trial the Defendant, FREDDIE LEE WILLIAMS, was found guilty of First Degree Murder of Mary Elizabeth Robinson. In the penalty phase trial the jury, by an 8 to 4 vote, recommended the death penalty.

The Court has considered the evidence presented at both phases of the trial, the advisory recommendation of the jury and the pre-sentence investigation.

The pre-sentence investigation was requested by the Defense and the Defense has read the pre-sentence investigation.

There are nine aggravating circumstances set out in Florida Statutes 921.41(5).

A review of the aggravating circumstances prescribed by statute shows that there are two aggravating circumstances present. These are Subsections (a) and (b) and are as follows:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or a felony involving the use of threat or violence to the person.

Regarding aggravating circumstance (a), the Defendant was under sentence of imprisonment when he committed the murder for which he was convicted in this case. In Count Two of Orange County Case Number CR74-3442, the Defendant pled guilty to possession of a firearm by a convicted felon, and on June 6, 1975 was sentenced to 10 years imprisonment. That at the time the murder in this case was committed the Defendant was still on parole. A person on parole is still under sentence of imprisonment. Aldridge v. State of Florida, 351 So2d 942.

Regarding aggravating circumstance (b), the Defendant had



been previously convicted of a felony involving the use of threat of violence to another. In Orange County Case Number 71-1551 the Defendant pled guilty to aggravated assault and was sentenced to 5 years imprisonment. In Count One of Orange County Case Number CR74-3442 the Defendant pled guilty to aggravated assault. In both of these aggravated assault cases Freddie Lee Williams shot his victims.

The other aggravating circumstances prescribed by statute are not present.

There are seven mitigating circumstances set out in Florida Statutes 921.41(6) (a) through (g), which are as follows:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

The Court has carefully considered the mitigating circumstances prescribed by Statute and finds none to be present.

Regarding mitigation circumstance (a), the defendant has a significant criminal activity as set out in the aggravating circumstances.

Regarding mitigating circumstance (b), the defendant was not under the influence of extreme mental or emotional disturbance. None of defendant's actions that evening show any mental or emotional problems.

Regarding mitigating circumstance (c), the victim was not a participant in defendant's conduct.

Regarding mitigating circumstance (d), the defendant was the sole perpetrator of the crime.

Regarding mitigating circumstance (e), the defendant did not act under extreme duress and he was not under the substantial domination of another. The defendant was a dominating person. In 1974 the defendant had shot the victim, Mary Elizabeth Robinson. He was under no duress whatsoever.

Regarding mitigating circumstance (f), the defendant was able to appreciate his criminal conduct and was not under any impairment. The testimony of the witnesses who were with the defendant before and after the shooting shows that defendant was under no undue mental or emotional stress or impairment of any kind.

Regarding mitigating circumstance (g), the defendant was 34 years old at the time of this murder. The age of the defendant is not a mitigating factor.

At the penalty phase trial the defendant presented evidence from relatives and friends that he is a good person and that he was kind to them. This evidence does not rise to a non-statutory mitigating circumstance which could offset the aggravating circumstances.

The victim, Mary Elizabeth Robinson, and the defendant, Freddie Lee Williams, lived together at 412 McFall Street. Early in the evening of November 7, 1980 the victim went to the house of her sister, Ada Mae Robinson. While at her sister's house the victim had two phone calls from the defendant. She was visibly upset by these calls. The victim and her sister then went to Jai Alai.

Some time after 11:00 p.m. Ada Mae Robinson drove the victim to the McFall Street apartment of the victim and the defendant. Shortly after Ada Mae Robinson got home she talked to the victim on the phone. About fifteen minutes later the defendant telephoned Ada Mae Robinson. At that time the victim was dead.

Early that evening, after the victim had left the apartment on McFall Street to go to her sister's house, the defendant borrowed a gun from his next door neighbor, William Peterson. The defendant then went out for the evening.

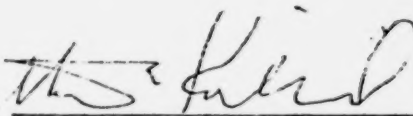
The defendant was given a ride home from his evening out by a long time friend, Rosalie Jones. He then went into the McFall Street

apartment and committed the murder.

The defendant testified he went into the aptment and found Mary Elizabeth Robinson shot and she died shortly thereafter. He then telephoned Ada Mae Robinson. However, there is very strong evidence showing that the defendant committed the murder. No attempt is made here to set out this evidence, because this Order is only concerned with the penalty aspect of this case.

Under the law of the State of Florida it is the judgment of this Court that FREDDIE LEE WILLIAMS is sentenced to death.

DONE and ORDERED at Orlando, Orange County, Florida, this 18th day of December, 1981.



THOMAS E. KIRKLAND  
CIRCUIT JUDGE

## IN THE CIRCUIT COURT FOR ORANGE COUNTY, STATE OF FLORIDA

THE STATE OF FLORIDA

VS.

FREDDIE LEE WILLIAMS

INFORMATION # CR74-3442

DIVISION *El Mexico*1) ASSAULT WITH INTENT TO COMMIT A  
FELONY2) POSSESSION OF A FIREARM BY CONVICTED  
FELON

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

ROBERT EAGAN, State Attorney of the Ninth Judicial Circuit  
prosecuting for the State of Florida in Orange County, CHARGES that  
on the 25th day of December, 1974

\_\_\_\_\_ in said County and State,  
FREDDIE LEE WILLIAMS did, in violation of Florida Statute 784.06, from a  
premeditated design to effect the death of MARY ELIZABETH ROBINSON, and  
with the intent there and then to murder her, did make an assault on the  
said MARY ELIZABETH ROBINSON with a deadly weapon, to-wit: A Handgun, and  
in furtherance of said premeditated design, assault and intent to murder,  
did then and there shoot and wound her, the said MARY ELIZABETH ROBINSON.

Count Two

AND ROBERT EAGAN, State Attorney of the Ninth Judicial  
Circuit prosecuting for the State of Florida in Orange County, CHARGES  
that on the 25th day of December, 1974, in said County and State, FREDDIE  
LEE WILLIAMS, did, in violation of Florida Statute 790.23, unlawfully have  
in his care, custody, possession and control a firearm, to-wit: A Handgun,  
he, the said FREDDIE LEE WILLIAMS having been prior thereto, to-wit: on  
the 24th day of January, 1972, convicted in the Criminal Court of Record,  
Orange County, Florida of a felony, to-wit: Aggravated Assault.

STATE OF FLORIDA, COUNTY OF ORANGE I HEREBY CERTIFY  
that the above and foregoing is a true copy of the original filed in this office.  
W. D. GORMAN, Clerk Circuit Court

Dated 10/16/75 by Sharon Ruppenger D.C.

STATE COURT	FILED EX. FREDERICKS
CASE # CR80 5117	DATE 10/20/75 EX. 115
W. D. GORMAN, CLERK BY <u>Sharon Ruppenger</u> D.C.	

FILED IN OFFICE  
JUN 23 3 35 PM '75  
CLERK OF CIRCUIT COURT  
ORANGE COUNTY, FLORIDA

ROBERT EAGAN, State Attorney  
Ninth Judicial Circuit of Florida

Bond \$ 10,000.00

29-26 n

75

*WCH*

897393 RECORDED

JUN 9 3 12 PM '75

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

ORANGE COUNTY CIRCUIT COURT

STATE OF FLORIDA,

c.s. 2625 vs 178

CASE NUMBER CR74-3442

Plaintiff,

FILED IN OPEN COURT

THIS 6 DAY OF JUNE, 1975

R. P. Kirkland, Clerk

vs. Fred Lee WilliamsSignature of Fred Lee Williams

Defendant.

## JUDGMENT AND SENTENCE

You, Fred Lee Williams, being now before the Court, attended by your attorney, James Valerius, and you having

(1) been tried and found guilty of (2) pleaded guilty to (3) pleaded nolo contendere to

Aggravated Assault - Count One

the Court Adjudges that you are guilty of said offense, and it is the Sentence of the Law and the Judgment of the Court that you, Fred Lee Williams, be committed to the

custody of the (4) Florida Division of Corrections (5) Orange County Correctional Facility (6) Orange County Jail, to be imprisoned at Hard Labor for a term of time served

and you are further Ordered to pay a fine and cost in the amount of \$

DONE and ADJUDGED in open Court at Orlando, Orange County, Florida this the 6th day of June, 19 75, pursuant to Rules 3.670 and 3.700 R.C.P.

Signature of Judge  
Judge

(Fingerprints, if required by Sec. 30.31 Florida Statutes)

4 FINGERS TAKEN SIMULTANEOUSLY LEFT HAND	LEFT THUMB	RIGHT THUMB	4 FINGERS TAKEN SIMULTANEOUSLY RIGHT HAND

I hereby certify that the above and foregoing fingerprints on this judgment are the fingerprints of the defendant, Fred Lee Williams, and that they were placed thereon by said defendant in my presence, in open court, this the 6th day of June, 19 75, pursuant to Sec. 30.31.

RECORDED &amp; RECORD VERIFIED

County Comptroller, Orange Co., Fla.

STATE OF FLORIDA, COUNTY OF ORANGE  
I HEREBY CERTIFY  
that the above and foregoing is a true copy of the original filed in this office.  
W. D. GILMAN, Clerk Circuit Court

Signature of W. D. Gilman  
June 10/19/75

897392 RECORDED

CRIMINAL DIV  
CIRCUIT COURT

JUN 9 3 12 PM '75

IN THE Circuit COURT  
OF THE NINTH JUDICIAL CIRCUIT IN AND  
FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

C.R. 2625 K 177  
Plaintiff,

CASE NUMBER CR 74-3442

FILED IN OPEN COURT

THIS 6th DAY OF June, 19 75

R. P. Kirkland, Clerk

-vs-  
FREDDIE LEE WILLIAMS

By [Signature]

Defendant.

JUDGMENT AND SENTENCE

You, Freddie Lee Williams, being now before the Court,  
attended by your attorney, James Valerius, and you having

(1) been tried and found guilty, or (2) pleaded guilty to (3) possession  
of firearms by connected felon - Court has

the Court Adjudges that you are guilty of said offense, and it is the Sentence of the Law and the Judg-  
ment of the Court that you, Freddie Lee Williams, be committed to the

custody of the (1) Florida Division of Corrections (2) Orange County Correctional Facility (3) Orange  
County Jail, to be imprisoned on Hard Labor for a term of Ten (10) years

with credit for time previously  
served

and you are further Ordered to pay a fine and cost in the amount of \$\_\_\_\_\_.

DONE and ADJUDGED in open Court at Orlando, Orange County, Florida  
this the 6th day of June, 19 75, pursuant to Rules 3.670 and 3.700 ECRP.

[Signature]  
Judge

(Fingerprints, if required by Sec. 30.31 Florida Statutes)

4 FINGERS TAKEN SIMULTANEOUSLY LEFT HAND	LEFT THUMB	RIGHT THUMB	4 FINGERS TAKEN SIMULTANEOUSLY RIGHT HAND

I hereby certify that the above and foregoing fingerprints on this judgment are the fingerprints of the  
defendant, Freddie Lee Williams, and that they were placed thereon by said  
defendant in my presence, in open court, this the 6th day of June, 19 75,  
pursuant to Sec. 30.31.

RECORDED & RECORD VERIFIED

[Signature]  
County Comptroller, Orange Co., Fla.

STATE OF FLORIDA, COUNTY OF ORANGE  
I HEREBY CERTIFY  
that the above and foregoing is a true copy of the original filed in this office.  
W. D. GORMAN, Clerk Circuit Court  
Dated 10/16/75 by Sharon [Signature]

C.C. [Signature] 7/25/75

[Signature] 6-6-75